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No. _____

In The

Supreme Court of the United States

October Term, 1995

THE NAVAJO NATION,

Petitioner,

v.

THE HOPI TRIBE and THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals incorrectly concluded that the Navajo Nation's sovereign immunity precluding an award of prejudgment interest had been abrogated by a section of the Navajo-Hopi Settlement Act which is silent on that subject, in view of the fact that two other sections of the Act authorizing different causes of action against the Nation explicitly abrogate sovereign immunity in connection with the imposition of such awards.

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PETITION FOR A WRIT OF CERTIORARI

The Navajo Nation[1] ("Nation" or "Petitioner") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

[1] The Navajo Tribal Code, NAVAJO TRIB. CODE tit. 1, § 301 (1978), requires officials of the Navajo Tribe to use the term "Navajo Nation" rather than "Navajo Tribe." The district court recognized and followed this requirement. *See* Order re: 1979-84 Grazing Rental Determination and Hopi Motion for Partial Summary Judgment re: Prejudgment Interest (App. 40).

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir. 1995) (App. 1). The opinion of the district court in *Hopi Tribe v. Navajo Tribe*, Civ. No. 85-801 PHX EHC, 87-1966 PHX EHC (Consolidated) (D. Ariz. 1992) is unreported (App. 40).[2]

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on January 30, 1995. The Court of Appeals denied a timely petition for rehearing on May 4, 1995 (App. 69).

The jurisdiction of this Court is invoked under 28 U.S.C. §§ 1254(1) and 2101(c) (1988).

STATUTORY PROVISIONS INVOLVED

§ 640d-15. Payment of fair rental value for use of lands subsequent to date of partition

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[2] As explained below, there were two opinions – one relating to homesite and farmsite rental determinations and one relating to the grazing rental determination. Although the issue of prejudgment interest was raised in both cases, the district court only addressed the issue with the grazing rental determination and incorporated said discussion in its homesite and farmsite rental determinations.

(a) Payment by Navajo Tribe

The Navajo Tribe shall pay to the Hopi Tribe the fair rental value as determined by the Secretary for all use by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to sections 640d-7 and 640d-2 or 640d-3 of this title subsequent to the date of the partition thereof.

25 U.S.C. § 640d-15(a) (1988).

§ 640d-17. Actions for accounting, fair value of grazing, and claims for damages to land

(a) Authorization to commence and defend actions in District Court

Either tribe, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof, is hereby authorized to commence or defend in the District Court an action or actions against the other tribe for the following purposes if such action or actions are not settled pursuant to section 640d-2 or 640d-3 of this title:

(1) for an accounting of all sums collected by either tribe since the 17th day of September 1957 as trader license fees or commissions, lease proceeds, or other similar charges for the doing of business or the use of lands within the joint use area, and judgment for one-half of all sums so collected, and not paid to the other tribe, *together with interest at the rate of 6 per centum per annum compounded annually;*

(2) for the determination and recovery of the fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, *together with interest at the rate of 6 per centum per annum compounded annually*, notwithstanding the fact that the tribes are tenants in common of such lands; and

(3) for the adjudication of any claims that either tribe may have against the other for damages to the lands to which title was quieted as aforesaid by the United States District Court for the District of Arizona in such tribes, share and share alike, subject to the trust title of the United States, without interest, notwithstanding the fact that such tribes are tenants in common of such lands: *Provided*, That the United States may be joined as a party to such an action and, in such case, the provisions of sections 1346(a)(2) and 1505 of title 28 shall not be applicable to such action.

(e) Remedies

All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments

obtained pursuant to the provisions of this subchapter.

25 U.S.C. §§ 640d-17(a) & (e) (1988) (emphasis added).

STATEMENT OF THE CASE

The narrow issue before the Court is whether Congress abrogated the Nation's sovereign immunity when it adopted the Navajo-Hopi Settlement Act, Pub. L. No. 93-531, 88 Stat. 1712 (codified as 25 U.S.C. §§ 640d to 640d-31 (1988 & Supp. 1993)) ("Settlement Act"), such that the Hopi Tribe was empowered to collect prejudgment interest for post-partition use by individual Navajos of the Hopi Partitioned Lands ("HPL"). Section 640d-15(a), which requires the Nation to pay post-partition rent, is silent with respect to prejudgment interest. In stark contrast to § 640d-15(a), two other sections, §§ 640d-17(a)(1) and (a)(2), authorize suits against the Nation and explicitly provide for the imposition of prejudgment interest.

In order for the Court to put this issue in context, a brief description of the longstanding land dispute between the Navajo Nation and the Hopi Tribe is presented below.

I. HISTORY SURROUNDING THE NAVAJO-HOPI LAND DISPUTE.

On December 16, 1882, President Chester A. Arthur signed an executive order setting aside a parcel of land which is approximately 55 miles wide and 70 miles long

in northeastern Arizona ("1882 Reservation") " 'for the use and occupancy of the Moqui [Hopis], and such other Indians as the Secretary of the Interior may see fit to settle thereon.' " *Healing v. Jones*, 210 F. Supp. 125, 129 (D. Ariz. 1962), *aff'd*, 373 U.S. 758 (1963) (per curiam). Navajo individuals resided on these lands both before and after the 1882 Reservation was created. Over the years the Nation's occupation of these lands increased as its population increased. The Hopi Tribe contended that it had exclusive use of these lands while the Nation contended that it had exclusive interest in approximately 4/5ths of the 1882 Reservation. *Id.* The dispute between the two tribes festered for years. The many attempts made to resolve the dispute were unsuccessful.

This led to Congress' enactment of legislation in 1958 authorizing the tribal chairmen of the respective tribes to commence or defend an action against each other and any other tribe of Indians claiming any interest in or to the 1882 Reservation to determine the rights and interests of these parties. Subsequently, the Hopi tribal chairman initiated the *Healing v. Jones* litigation. In *Healing v. Jones*, a three judge district court determined that the Hopi Tribe and the Navajo Nation had joint, undivided and equal interests in and to a portion of the 1882 Reservation, known as the joint use area ("JUA"). *Healing v. Jones*, 210 F. Supp. at 189-190. The court also concluded that Congress did not mandate the division of the 1882 Reservation between the two tribes. *Id.*

When co-tenancy proved unworkable, Congress passed the Settlement Act of 1974 which, among other things, developed a mechanism for dividing the JUA into the Navajo Partitioned Lands ("NPL") and the HPL. The

boundary between the NPL and the HPL did not correspond precisely with the pattern of settlement of the JUA. Thus, the Settlement Act authorized relocation of the Hopis and Navajos to their respective lands. Indeed, the partition ordered by the district court resulted in the relocation of approximately 10,000 Navajo people from their ancestral lands.[3] Navajo-Hopi Land Commission Office, NAVAJO RELOCATION, A SPECIAL REPORT FROM THE NAVAJO-HOPI LAND COMMISSION OFFICE. Pending culmination of the relocation process, which is still not completed, the Settlement Act directs that the occupying tribe compensate the other tribe for the fair rental value of all use of the partitioned lands from and after the date of partition of the former JUA. 25 U.S.C. § 640d-15 (1988). Although requiring the payment to the Hopi Tribe of post-partition rent by the Nation, § 640d-15(a) makes no mention of an award of prejudgment interest. Whether an award of such interest is proper is the narrow issue raised by the Nation's certiorari petition.

II. PROCEEDINGS BELOW.

The instant litigation originally stemmed from the parties' disagreement over the proper valuation of individual Navajos' post-partition use of the HPL for grazing, homesites and farming which was rendered by the Secretary of the Interior ("Secretary") pursuant to his authority

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[3] Fewer than 20 Hopi individuals were required to relocate from the NPL.

under § 15(a) of the Settlement Act. Section 15(a) authorizes the Secretary to determine the "fair rental value" of all uses made by Navajo individuals of the HPL from and after the date of partition of the former JUA. The calculation of post-partition rent has been dealt with in two separate proceedings and for the Court's ease of understanding, the proceedings will be explained separately.

A. Homesite and Farmland Rental Determinations.

The Nation invoked the jurisdiction of the Interior Board of Indian Appeals ("IBIA") in its appeal of the decision of the Acting Deputy Assistant Secretary – Indian Affairs, Department of the Interior, regarding the homesite and farmland rental determinations concerning the Nation's use of the HPL. The appeal was initiated on January 3, 1986, pursuant to 25 C.F.R. § 2.19(c)(2) (1986) and 43 C.F.R. § 4.332(a) (1983). The IBIA affirmed the rental determinations of the Acting Deputy Assistant Secretary – Indian Affairs with slight modification to correct for errors in site and use identification.

In a suit unrelated to any secretarial determination of post-partition rent, the Hopi Tribe invoked the jurisdiction of the district court in 1985 against the Nation and the Secretary to facilitate the collection of rental payments due the Hopi Tribe from the Nation pursuant to § 15(a).[4] The Hopi Tribe's complaint invoked the district

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[4] The Secretary determined that since he was not obligated to collect his rental determinations from the Nation, "it follows that he does not have the authority to collect interest on the

court's jurisdiction pursuant to 28 U.S.C. §§ 1331, 1361 and 1362 (1988). On July 6, 1992, the district court entered its order rendering judgment in favor of the Hopi Tribe in the amount of $586,803.60, representing the amount determined to be due from the Nation for the homesite rental by Navajo individuals from April 18, 1979 through December 31, 1984.[5] The court of appeals affirmed the judgment of the district court. 46 F.3d at 918 (App. 22). This Petition for a Writ of Certiorari does not include any issues relating to that portion of the Ninth Circuit's opinion regarding valuation of homesites.

B. Grazing Rental Determination and Award of Prejudgment Interest.

The Nation invoked the jurisdiction of the Commissioner of Indian Affairs, Department of the Interior, in the Nation's appeal of the decision of the Area Director on April 29, 1985, pursuant to 25 C.F.R. §§ 2.1-2.21 (1994). Almost two years later, this appeal was summarily dismissed as untimely by the Assistant Secretary – Indian Affairs.

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rental." Letter from Hazel E. Elbert, Acting Deputy Assistant Secretary – Indian Affairs to John Paul Kennedy & Louis Denetsosie (Nov. 25, 1985) (App. 64).

[5] The BIA's determination of rental value for Navajo farmland on the HPL for the period 1979-1984 was remanded for a more thorough analysis of the price of Indian corn, to develop reliable yield data for Indian corn, and to exclude the number of acres properly allowed to lie fallow each year.

Challenging the Secretary's decision, the Nation invoked the jurisdiction of the district court pursuant to 28 U.S.C. §§ 1331 and 1362 (1988), and the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706 (1994). On July 6, 1992, the district court affirmed the Secretary's summary dismissal of the Nation's administrative appeal and awarded grazing rental in the amount of $726,348.93 (App. 62). In addition, the district court denied the Hopi Tribe's motion for summary judgment as to its claim that the Nation was liable for prejudgment interest on the rental determinations (App. 63).

With respect to the grazing rental determination, the court of appeals held that the Nation did not receive actual notice of the final grazing rental determination until April 3, 1985, that the Nation thereafter filed a timely notice of administrative appeal, and therefore, the district court erred in ruling that it lacked jurisdiction to review the grazing rental determination under the Administrative Procedure Act. 46 F.3d at 920-921 (App. 29-30). Thus, the court of appeals remanded the grazing rental determination to the district court, and to the Secretary for review of the Area Director's award. 46 F.3d at 911 (App. 4).

Further, the court of appeals held that the district court erred in refusing to award prejudgment interest on the grazing rental determination. 46 F.3d at 923 (App. 30). Accordingly, the court reversed the district court's ruling denying the Hopi Tribe prejudgment interest and remanded to the district court for a determination of the amount of such interest owed under 25 U.S.C. §§ 640d-15(a) and 640d-17(e). 46 F.3d at 923 (App. 37).

The narrow issue presented by the Nation's petition is whether the appeals court was correct when it determined that Congress abrogated the Nation's immunity thereby authorizing an award of prejudgment interest on the grazing rental determination.

REASONS FOR GRANTING THE PETITION

In rendering its determination, the Ninth Circuit disregarded the Supreme Court's repeated admonition that congressional abrogations of Indian tribal immunity must be unequivocally expressed. No such unequivocal expression of waiver or abrogation can be found in 25 U.S.C. §§ 640d-15(a) or 640d-17(e) (1988). Failure to follow precedents of this Court in the area of abrogation is a matter of exceptional importance to the Navajo Nation, as well as all other Indian tribes. Moreover, the Ninth Circuit's decision is erroneous, and represents a conflict within its own circuit.

I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS CONFLICTS WITH APPLICABLE DECISIONS OF THE SUPREME COURT AND OF ITS OWN CIRCUIT

A. Sovereign Immunity Bars a Suit Against an Indian Tribe Absent Express Consent or Congressional Abrogation.

The law is decisive regarding the existence and vitality of the doctrine of Indian tribal immunity from suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)

("Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers."); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165, 172 (1977) ("Absent an effective waiver or consent, it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe."); *United States v. United States Fidelity & Guar. Co.*, 309 U.S. 506, 512 (1940) ("These Indian Nations are exempt from suit without Congressional authorization. It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." (citation omitted)); *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989); *In re Greene*, 980 F.2d 590 (9th Cir. 1992), *cert. denied sub nom Richardson v. Mount Adams Furniture*, 114 S. Ct. 681 (1994).

Even as recently as 1991, the Court reaffirmed that Indian tribes enjoy sovereign immunity and rejected a state's contention that the doctrine should be either narrowed or eliminated when a tribe engages in a business activity. *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.").

The Ninth Circuit correctly acknowledged that this is the applicable rule associated with abrogations of tribal immunity from suit. 46 F.3d at 921 (App. 30) (" '[i]t is settled that a waiver "cannot be implied but must be unequivocally expressed." ' " (citation omitted)). Notwithstanding this unequivocal rule, the Ninth Circuit ignored it and found a waiver of the Nation's immunity in 25 U.S.C. § 640d-17(e) (1988). That section provides:

> All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this subchapter.

Id. The Ninth Circuit misread the language of this section, which relates solely to the enforcement and collection of judgments either tribe might obtain against the other pursuant to the litigation authorized by the Settlement Act. The language states that with regard to the enforcement and collection of judgments obtained under this subchapter, the tribes may utilize either provisional and final remedies provided by the Federal Rules of Civil Procedure, and/or any other remedies available in the district courts. It is unambiguously clear that the two introductory phrases of § 640d-17(e) modify the language referring to the enforcement and collection of judgments. The district court so concluded when it held: "Further, the award of prejudgment interest is not the 'enforcement and collection of judgments.' " *Hopi Tribe v. Navajo Tribe*, Nos. CIV 85-801 PHX EHC, CIV 87-1966 PHX EHC (Consolidated), Slip Op. at 20 (D. Ariz. July 6, 1992) (App. 59).

The Ninth Circuit read only one phrase from § 640d-17(e) when it stated that this section accorded the parties "blanket authorization of 'all remedies available' in federal district courts . . . . " 46 F.3d at 922 (App. 33). Section 640d-17(e) is not a blanket authorization to the parties to utilize all remedies available to private litigants in district courts or as found in the Federal Rules of Civil

Procedure. Rather, it plainly states that remedies available either in the Federal Rules or normally available in district courts "may be used in the enforcement and collection of judgments obtained" under the Settlement Act. 25 U.S.C. § 640d-17(e) (1988). The Ninth Circuit took one phrase out of context from § 640d-17(e), thereby distorting the plain meaning of this section. In so doing, the court did violence to a sacred and archetypal principle of Indian law which has been repeatedly upheld by this Court, as well as the Ninth Circuit itself, that tribal sovereign immunity will not be deemed abrogated by congressional legislation unless expressed unequivocally therein. *Santa Clara Pueblo*, 436 U.S. 49; *Puyallup Tribe*, 433 U.S. 165; *United States Fidelity & Guar. Co.*, 309 U.S. 506; *Oklahoma Tax Comm'n*, 498 U.S. 505; *Evans v. McKay*, 869 F.2d at 1346 ("Moreover, a waiver of sovereign immunity must be 'unequivocally expressed.' " (citation omitted)); *In re Greene*, 980 F.2d 590.

There is ample precedent demonstrating the manner in which Congress can and has expressed itself unequivocally when abrogating an Indian tribe's immunity from suit. For example, in *Santa Clara Pueblo*, the Court narrowly construed 25 U.S.C. § 1303, a provision of the Indian Civil Rights Act (codified as 25 U.S.C. §§ 1301-1303 (1988 & Supp. 1993)) ("the ICRA"), which states that "[t]he privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe." 25 U.S.C. § 1303 (1988). The Court rejected the contention that the ICRA authorized civil suits for equitable relief in federal courts against Indian tribes and

their officials because of tribal immunity from suit, notwithstanding the fact that literally hundreds of such suits had been entertained by district courts since 1968 when the ICRA became law. Relying on *United States v. Testan*, 424 U.S. 392 (1976), and *United States v. King*, 395 U.S. 1 (1969), the Court held that "[i]t is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.' " *Santa Clara Pueblo*, 436 U.S. at 58. Thus, the Court read § 1303 consistent with its plain meaning and refused to give it the expansive interpretation urged by Martinez, the aggrieved individual Indian.

Following the rule of *Santa Clara Pueblo*, § 640d-17(e) may not be read expansively to include an abrogation of immunity beyond the plain meaning of the language contained therein. Indeed, this section was no doubt included in the Act precisely because of the tribes' immunity. Thus, without this section the normal tools available to private litigants to enforce and collect judgments would not be available to the Nation or the Hopi Tribe. But § 640d-17(e) was intended to abrogate tribal immunity only with respect to the enforcement and collection of judgments, and not with respect to any other matters not explicitly addressed therein.

This Court has assiduously adhered to the principle that although Congress has the power to abrogate a tribe's sovereign immunity, it must do so unequivocally and with unmistakable clarity and has construed a variety of congressional enactments in tight conformance with this rule. The Ninth Circuit, although purporting to adhere to this rule, in fact violated it when it concluded that the Nation's immunity from the imposition of prejudgment interest was waived implicitly in the language

of 25 U.S.C. § 640d-17(e) (1988). That section is addressed solely to the power of the tribes to enforce and collect judgments obtained under the Settlement Act. It has nothing to do with the imposition of prejudgment interest or any other so-called remedies available to litigants in district courts.

B. The No-Interest Rule Applies to Judgments Against the United States and to Judgments Against Indian Tribes.

This Court, as well as the Ninth Circuit, has held that the immunity enjoyed by Indian tribes is coextensive with that of the United States. *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983) (citing *Santa Clara Pueblo*, 436 U.S. at 58); *Evans v. McKay*, 869 F.2d at 1345 ("The common law immunity afforded Indian tribes is coextensive with that of the United States . . . . "). This Court long ago clearly established the general rule that no interest is allowed on claims against the federal government, except where Congress has expressly waived its sovereign immunity from an award of interest. *United States ex. rel. Angarica v. Bayard*, 127 U.S. 251, 260 (1888); *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 658-659 (1947) ("[I]n the absence of constitutional requirements, interest can be recovered against the United States only if express consent to such a recovery has been given by Congress."); *United States v. Mescalero Apache Tribe*, 518 F.2d 1309, 1318-1324 (1975), *cert. denied*, 425 U.S. 911 (1976) (the no-interest rule has been applied to prevent parties from holding the United States liable on claims grounded on the belated receipt of funds even when characterized as compensation for delay); *Library of*

Congress v. Shaw, 478 U.S. 310, 311 (1986) ("[t]he no-interest rule is to the effect that interest cannot be recovered in a suit against the Government in the absence of an express waiver of sovereign immunity from an award of interest."); *Doyle v. United States*, 931 F.2d 1546, 1550 (Fed. Cir. 1991).

The principles of the no-interest rule apply equally to an Indian tribe unless or until the rule is expressly limited by Congress. The district court properly rejected the Hopi Tribe's claim for prejudgment interest, relying on *United States v. United States Fidelity & Guar. Co.*, 106 F.2d 804 (10th Cir. 1939), *rev'd on other grounds*, 309 U.S. 506 (1949), to support its holding that "Indian tribes, having sovereignty similar to that of the United States, are not liable for interest unless liability is created by statute or assumed by an authorized contract." (App. 57). Indeed, the Ninth Circuit refused to entertain the Hopi Tribe's contention that a less stringent standard than that applied to the United States should be used when determining whether tribal immunity has been waived or abrogated. 46 F.3d at 921 n.7 (App. 31 n.7). Notwithstanding the appeal court's refusal to depart from that standard, it ignored controlling precedent in its Circuit relating to the imposition of interest against the United States.

In *International Woodworkers v. Donovan*, 792 F.2d 762 (9th Cir. 1986), the issue before the court was whether interest could be included in the attorney fee award against the Secretary of Labor. The statute at issue was 28 U.S.C. § 1961(a) (1988) which provides that "[i]nterest shall be allowed on any money judgment in a civil case recovered in a district court." *Id.* The court noted that the statute did "not contain any references to attorney fee

awards under the [Equal Access to Justice Act.]" 792 F.2d at 766. Thus, the Court refused to award interest on the attorney fee amount holding that "interest is not payable on a judgment against the United States except as specifically provided by statute." *Id.*

Notwithstanding the rule that Indian tribes' immunity is coextensive with that of the United States and its own strict interpretation in the *International Woodworkers* decision, the Ninth Circuit concluded that § 640d-17(e) abrogated the Nation's immunity from prejudgment interest irrespective of its failure to authorize the award of prejudgment interest. The decision below fails to treat the Nation's immunity as coextensive with that of the United States, and fails to even mention the *International Woodworkers* decision. Clearly, the Court cannot countenance a flagrant disregard of principles articulated by the Court, as well as by the Ninth Circuit itself.

II. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS ERRONEOUS

A. The Ninth Circuit's Determination Renders the Settlement Act Internally Inconsistent.

The Ninth Circuit's finding in § 640d-17(e) of "blanket authorization of 'all remedies available' in federal district courts . . . ," 46 F.3d at 922 (App. 33), is nonsensical when read together with the Settlement Act as a whole. The court was faced with the obvious problem that Congress explicitly provided for prejudgment interest (in the specified amount of 6% compounded annually) in connection with two suits authorized to be filed

against the Nation by the Hopi Tribe – the so-called accounting and use cases, 25 U.S.C. §§ 640d-17(a)(1) and 17(a)(2) (1988), – but had failed to mention prejudgment interest in § 640d-15(a), the section providing for post-partition rent. To justify its conclusion that § 640d-15(a) was "subject to the general and sufficiently unequivocal remedy provision set forth in section 640d-17(e)," 46 F.3d at 923 (App. 35), the Ninth Circuit purported to distinguish the two former subsections from the latter. However, the court's distinctions are flatly wrong.

The Ninth Circuit characterized §§ 640d-17(a)(1) and (a)(2) as providing for suits to collect "reasonably ascertainable monies already collected by one tribe and owed to the other." 46 F.3d at 923 (App. 35). While this statement is theoretically correct with respect to § 640d-17(a)(1), it could not be further from the truth with regard to § 640d-17(a)(2). Section 640d-17(a)(1) authorized an accounting of all fees, licenses, lease proceeds and the like collected from persons doing business on the JUA during the time the two tribes were owners as tenants in common. Section 640d-17(a)(2) authorized suit to recover the fair value of grazing and agricultural uses by either tribe and its members of the undivided one-half interest of the other tribe in the JUA from 1962 to the date of partition.

The Ninth Circuit then juxtaposed those sections with § 640d-15(a): "In contrast, section 640d-15(a) prospectively authorized recovery of post-partition rent that Congress knew would be owed in some then uncertain amount, but had no cause to suspect would be paid only after protracted settlement efforts and lengthy litigation." 46 F.3d at 923 (App. 35). The court's characterization is

again flatly wrong. The amounts owed under § 640d-15(a) and § 640d-17(a)(2) are equally uncertain. Indeed, in many respects they are mirror image amounts, the difference being that § 640d-17(a)(2) relates to the pre-partition period ending in April, 1979, while § 640d-15(a) relates to the post-partition period beginning that same date. Litigation under both sections remains ongoing and protracted and it is unclear at this point when it will likely conclude. The distinctions the appeals court made between these sections are spurious and do not justify the invasion of the Nation's immunity not explicitly provided for by Congress.

In short, the Ninth Circuit failed in its attempt to explain why Congress unequivocally authorized the imposition of prejudgment interest in §§ 640d-17(a)(1) and (a)(2), but failed to mention prejudgment interest in § 640d-15(a). Notwithstanding this obvious and unmistakable difference in language, the court assured the Nation that it makes no difference. Either way, according to the court, Congress intended to award prejudgment interest, notwithstanding the Nation's immunity from suit. Even if the court were correct, the explicit inclusion of prejudgment interest in §§ 640d-17(a)(1) and (a)(2) would have been superfluous, since, according to the court, prejudgment interest was already provided for in § 640d-17(e). The court's conclusion makes no sense and in effect rewrites the statute by asserting that "the overriding congressional purpose behind the Settlement Act [was] full compensation to the Hopi Tribe for the fair rental value of Navajo-occupied lands." 46 F.3d at 922 (App. 32). This so-called purpose is not stated anywhere

in the legislative history of the Act but rather was erroneously contrived by the Ninth Circuit.

B. Even if Prejudgment Interest Is a Damage Remedy, the Amount in Controversy Is Not Ascertainable.

Assuming arguendo that § 640d-17(e) accorded the parties "blanket authorization of 'all remedies available' in federal district courts . . . . " 46 F.3d at 922 (App. 33), and that "all remedies available" includes an award of prejudgment interest, the Ninth Circuit's analysis is flawed because it failed to determine whether the Hopis' claim to rent was liquidated and ascertainable. The most significant limitation on the recovery of prejudgment interest is the general common law rule that prejudgment interest is not recoverable on claims that are neither liquidated as a dollar sum nor ascertainable by fixed standards. *Miller v. Robertson*, 266 U.S. 243, 258 (1924). A liquidated claim is one in which the amount due and the due date is fixed and certain, when the amount due and the due date can be simply ascertained by a mathematical computation, or where the amount due can be determined by reference to a recognized standard. *See Green Const. Co. v. Kansas Power & Light Co.*, 1 F.3d 1005, 1010 (10th Cir. 1993); *All West Pet Supply Co. v. Hill's Pet Prods. Div.*, 842 F. Supp. 1376 (D. Kan. 1994); *Schenk v. Smith*, 793 P.2d 231 (Idaho Ct. App. 1990).

Admittedly a market value can provide a recognized standard in certain situations, "[b]ut the market must yield an identifiable value or reasonably consistent set of values." *Schenk*, 793 P.2d at 233. That is not the situation

presented here. The Nation's experts strongly disagreed with the BIA's appraiser regarding the existence of comparable market data for any use of the HPL. Thus, the amount due varies tremendously depending on the appraiser employed and the methodology used. The calculation of "fair rental value" requires an extensive administrative process to ascertain the amount due. The amount due changes from year to year based on the many variables involved: the number of Navajo relocatees moving to their new homeland; the varying number of livestock grazing on the HPL; the unknown number of livestock trespassing upon the HPL. Clearly, the "fair rental value" for post-partition use of the HPL is anything but liquidated and ascertainable.

CONCLUSION

The Ninth Circuit's decision disregarded well established principles concerning tribal sovereign immunity and the manner in which Congress may abrogate it. Furthermore, the court failed to follow the unambiguous instruction of Congress when it adopted the Settlement Act and explicitly provided for prejudgment interest on two occasions, but conspicuously omitted any mention of it in the companion section related to post-partition rent. Finally, the appeals court misread § 640d-17(e), which authorizes the tribes to utilize remedies available for the enforcement and collection of judgments, to include an implicit abrogation of immunity broad enough to include an award of prejudgment interest. Section 640d-17(e) is silent on the subject of such awards, and the expansive

sweep the court of appeals accorded that section is flatly inconsistent with the holding in *Santa Clara Pueblo*.

For all these reasons, the Navajo Nation respectfully requests the Court grant its petition and issue a writ of certiorari to the Court of Appeals for the Ninth Circuit.

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In The

Supreme Court of the United States

October Term, 1995

THE NAVAJO NATION,

Petitioner,

v.

THE HOPI TRIBE and THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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The HOPI TRIBE, Plaintiff-Appellee-Cross-Appellant,

v.

The NAVAJO TRIBE, et al., Defendants-Appellants-Cross-Appellees,

v.

UNITED STATES of America, et al., Defendants-Appellees.

Nos. 92-16448, 92-16510, 92-16839 and 92-16840.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 10, 1994.
Decided Jan. 30, 1995.

Navajo Nation sought judicial review of determination by Secretary of the Interior of fair market rental value of homesites and grazing rights due Hopi Tribe under Navajo-Hopi Settlement Act. The United States District Court for the District of Arizona, Earl H. Carroll, J., ordered enforcement of award to Hopi Tribe. Cross appeals were taken. The Court of Appeals, Choy, Circuit Judge, held that: (1) determination of rental value of homesites used by Navajo Nation members was not an abuse of discretion; (2) notice of final grazing rental determination given to Navajo Nation violated due process; and (3) Congress waived any tribal immunity from prejudgment interest.

Affirmed in part, reversed in part, and remanded.

Tim Atkeson, Arnold & Porter, Denver, CO, for plaintiff-appellee-cross-appellant, Hopi Tribe.

Bruce R. Greene, Greene & Meyer, Boulder, Colorado, for defendant-appellant-cross-appellee, Navajo Nation, et al.

Katherine W. Hazard, U.S. Dept. of Justice, Washington, DC, for defendants-appellees, U.S., et al.

Appeals from the United States District Court for the District of Arizona.

Before: CHOY, POOLE and REINHARDT, Circuit Judges.

OPINION

CHOY, Circuit Judge:

We have before us in these consolidated appeals and cross-appeals another in a series of disputes between the Hopi and Navajo tribes stemming from what was once characterized as " 'the greatest title problem of the West.' " *Healing v. Jones*, 210 F.Supp. 125, 129 (D.Ariz.1962), *aff'd* 373 U.S. 758, 83 S.Ct. 1559, 10 L.Ed.2d 703 (1963) (per curiam).

The Navajo Nation appeals the district court's order enforcing an award to the Hopi Tribe under the Navajo-Hopi Settlement Act, Pub.L. No. 93-531, 88 Stat. 1712, 25 U.S.C. § 640d, *et seq.* (1980) (the Settlement Act). On the basis of an appraisal issued by the Bureau of Indian

Affairs (BIA) and adopted by the Secretary of the Interior (the Secretary), the district court awarded the Hopi Tribe $586,803.60 (the homesite rental determination) for the fair market rental value of homesites occupied by Navajos between 1979 and 1984 in formerly shared lands after their partition and allocation to the Hopi Tribe.

The Navajo Nation appeals this award on the ground that the BIA and the Secretary arbitrarily disregarded relevant factors pertaining to the measurement and valuation of homesite tracts and thereby abused their discretion under the Administrative Procedure Act, 5 U.S.C.A. § 706(2)(A) (1977 & Supp.1993) (the APA). We affirm the judgment of the district court denying the Navajo Nation's motion for review and granting the Hopi Tribe's motion for judgment upon and enforcement of the homesite rental determination.

The Navajo Nation further appeals the district court's denial of its motion for review of the BIA's determination of the fair market value of the Navajo Nation's post-partition use of Hopi lands for raising livestock between 1979 and 1984, and its motion for summary judgment regarding the dismissal of its administrative appeal challenging the BIA's appraisal. The Assistant Secretary of the Department of the Interior (the Assistant Secretary) declined to consider the Navajo Nation's administrative appeal because the notice of appeal was untimely. The district court concluded that the Assistant Secretary acted properly and denied the motion for summary judgment. On the basis of the BIA's appraisal, the district court awarded the Hopis $1,186,190.77 (the grazing rental determination).

The Navajo Nation contends that the district court and the Assistant Secretary erred in refusing to review this award because the BIA's failure to provide the Navajo Nation constitutionally adequate notice of the final grazing rental determination excused the untimeliness of its petition for review. We agree and remand to the district court for review of the award.

The Hopi Tribe cross-appeals the district court's denial of its motion for summary judgment seeking prejudgment interest on the grazing rental determination. We reverse and remand for a determination of the amount of prejudgment interest owed.

BACKGROUND

These consolidated appeals and cross-appeals stem from a longstanding dispute over the continued presence of Navajo Indians on 900,000 acres of the Hopi Reservation in northern Arizona. More specifically, these appeals arise from the parties' disagreement over the proper valuation of Navajos' post-partition use of Hopi lands for grazing and homesites and the extent of the Navajo Nation's sovereign immunity from prejudgment interest on the grazing rental determination.

On December 16, 1882, President Chester A. Arthur signed an executive order withdrawing from the public domain 3,900 square miles in northeastern Arizona to be set aside " 'for the use and occupancy of the Moqui [Hopis], and such other Indians as the Secretary of the Interior may see fit to settle thereon.' " *Healing*, 210 F.Supp. at 129. Long after the creation of the 1882 Executive Order Reservation, the respective entitlements of the

Navajo and Hopi tribes in these and surrounding lands remained disputed. In 1962, a special district court panel ruled that the Navajo Nation and the Hopi Tribe had undivided and equal interests in, and should jointly use, a portion of the 1882 Executive Order Reservation that included the 900,000 acres of Hopi land at issue in this appeal (the Joint Use Area). *Id.* at 191-92.

When this compromise proved unworkable, Congress divided the Joint Use Area into the Navajo Partitioned Lands (NPL) and the Hopi Partitioned Lands (HPL) pursuant to the Settlement Act. The boundary between the NPL and the HPL did not correspond precisely with the patchwork pattern of Hopi and Navajo settlement of the Joint Use Area. Moreover, the Settlement Act permitted the gradual relocation of Hopis and Navajos, still ongoing, to their respective lands. Pending completion of this process, where one tribe's members continue to use or occupy a portion of the other tribe's lands, the Settlement Act mandates that the occupying tribe compensate the other for the "fair rental value" of such use or occupancy. At issue in these appeals is the requirements under section 640(d)-15(a) of the Settlement Act that:

> The Navajo Tribe shall pay to the Hopi Tribe the fair rental value as determined by the Secretary for all use by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to [this Act] subsequent to the date of partition thereof.

25 U.S.C. § 640d-15(a).

In the late 1970s and early 1980s, the Project Officer of the Joint Use Area Administrative Office in Phoenix,

Arizona (the Project Officer), undertook to develop a methodology for calculating the amount owed to the Hopi Tribe under section 640d-15(a) for the grazing of Navajo herds in the HPL. The lack of sales data for these rangelands and the absence of closely comparable off-reservation real estate complicated this task. The Deputy Assistant Secretary for Indian Affairs (Deputy Assistant Secretary) contracted for an appraisal taking into account the market value both of Navajo livestock grazed on the HPL and the native grasses they consumed there. In doing so, the Deputy Assistant Secretary rejected the Navajo Nation's proposed methodology based on rent charged by other federal agencies for federal lands.

On March 31, 1983, the Navajo Nation moved for reconsideration of the Deputy Assistant Director's "final decision" on behalf of the Department of the Interior in this matter. Factoring in new data while retaining the livestock-based methodology objected to, the Phoenix Area Director of the BIA recalculated the grazing rental determination. The Area Director then notified the Navajo Nation of the revised determination in a letter addressed to the Navajo chairman. The chairman of the Hopi Tribe was notified by delivery of a copy of the letter to the Navajo chairman.

The tribes requested further consultations. Between October 1984 and February 1985, the Area Director met with tribal representatives to discuss the final grazing rental determination. In January 1985, an updated appraisal led the Area Director to lower the preliminary

grazing rental determination to $1,328,025.77.[1] The Area Director notified the Hopi Tribe of this revised valuation in a letter addressed to the Hopi chairman dated February 15, 1985.

The Area Director mailed a copy of this letter, in an envelope addressed to the Navajo chairman, by regular mail to the Navajo Nation. Navajo officials promptly received and logged the letter, but then misrouted it to an internal department unaware of its import and the timetable for administrative appeal that might be set in motion thereby. The Navajo Nation acknowledges that on February 19, 1985, it received a copy of the February 15 letter to the Hopi chairman. The Navajo Nation also concedes that the Area Director did not receive the Navajo Nation's notice of appeal, dated April 29, 1985, until May 2, 1985, 72 days after the Navajo's receipt of notice of the final determination and more than one month after the expiration of the 30-day period for appeal under the 1985 version of 25 C.F.R. § 2.10(a), the version of the BIA regulation governing administrative appeals which is applicable here.

The Hopi Tribe moved to dismiss the Navajo Nation's appeal for untimeliness. In a letter dated February 24, 1987, the Assistant Secretary granted this motion. The Navajo Nation challenges the district court's refusal to overturn the Assistant Secretary's action on the ground that the notice of the final grazing rental determination

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[1] On July 2, 1988, this figure was again reduced to $1,186,190.77 to accord with the tribes' agreement that the calculation had been based on a premature date of partition.

given to the Navajo Nation was constitutionally insufficient.

Following the issuance of the BIA's final grazing rental determination in February 1985, the Deputy Assistant Secretary turned her attention to the previously deferred matter of calculating farmland and homesite rental values. On November 26, 1985, the Deputy Assistant Secretary issued a ruling rejecting the Project Officer's 1980 homesite and farmland valuations for lack of supporting data. The Deputy Assistant Secretary then directed the BIA's central Office to gather new data and issue a revised appraisal.

On November 22, 1986, the report of BIA Appraiser Arvel Hale (the Hale Report) was released. The Hale Report was based on data culled from aerial photographs, on-site inspections, study of topographic maps, and monitoring of relocation by Navajos from the HPL. Adopting a "capitalization of market" approach, the Hale Report calculated homesite rental values by comparing Navajo-occupied portions of the HPL to real estate sold in arms-length transactions in adjacent counties. Hale asserted that a "conscienceous [sic] effort was made to find tracts that had the same limitation as those on the HPL; *i.e.*, no domestic water systems, highway frontage or electrical power." After identifying 129 sales of tracts deemed comparable to Navajo homesites in the HPL, Hale categorized the sold properties and the homesite tracts according to size, climate, elevation and vegetation. Because the Hale Report found little correlation between sale price and proximity to water and paved roads, its calculations did not take these factors into account. Finally, HPL tracts were assigned an annual rental value of 10% of market

value, after adjustment for differences in size and date of sale influencing the market value of off-reservation properties in the same category.

The Navajo Nation brought an appeal before the Interior Board of Indian Appeals (IBIA) challenging the Deputy Assistant Secretary's adoption of the homesite and farmland rental valuations set forth in the Hale Report. This challenge was based on the same objections raised by the Navajo Nation in this appeal as to double billing for grazing and homesite uses, miscalculation of abandoned sites, assumptions about minimum homesite size, reliance on misleading comparables and misidentification of the use to which Navajos were dedicating certain parcels. Pursuant to its privately commissioned critique of the BIA's appraisal (the Centerfire Report), the Navajo Nation proposed an alternative valuation of the fair rental value of the HPL used by Navajos for agricultural and homesite purposes.

On November 26, 1985, the IBIA affirmed the Deputy Assistant Secretary's determination, subject to the BIA's correction of minor misidentifications of use. The IBIA noted the extensive documentation in support of the BIA's appraisal and deemed reasonable the operating assumptions in the Hale Report to which the Navajo Nation had objected. However, the IBIA remanded the homesite rental determination for review of the Navajo Nation's claimed factual errors and correction of verified errors.

On remand, the Acting Area Director of the BIA's Phoenix office considered two rounds of extensive comments and alleged errors raised by the Navajo Nation, as

well as the response of the Hopi Tribe, before preparing the final homesite rental determination. The Navajo Nation bolstered its challenge with a list of homesites it alleged were abandoned or dedicated to other uses and thus improperly factored into the homesite rental determination. The Area Director rejected the Navajo Nation's reiterated objections but ordered that revisions be made to correct and update the appraisal, including the deletion of 95 homesites from the BIA's rental rolls. On March 18, 1988, the Assistant Secretary approved and adopted this corrected homesite rental determination.

On May 8, 1987, the Navajo Nation filed suit in the District of Columbia to challenge the Assistant Secretary's dismissal of its appeal of the Acting Director's grazing rental determination. The case was transferred to the District of Arizona and consolidated with the Hopi Tribe's action there in connection with the entire range of the Navajo Nation's post-partition use and occupancy of the HPL. The Hopi Tribe had initiated this action in 1985 to compel the Secretary to issue the rental determinations promptly and accurately.

The Navajo Nation filed a motion for summary judgment challenging the Assistant Secretary's dismissal of the Navajo Nation's administrative appeal for untimeliness. The Navajo Nation contended that the Assistant Secretary violated the tribe's due process right to adequate notice and his trust responsibilities to the Navajo Nation.

On July 2, 1992, the district court issued two orders addressing the grazing rental determination and the homesite/farmland rental determinations respectively. In

one order, the district court granted the United States' motion to dismiss the Navajo Nation's challenge to the Secretary's dismissal of its administrative appeal of the grazing rental determination. The district court concluded that due process "does not require notice by personal service upon the Navajo Chairman," and found no trust responsibility mandating liberal interpretation of Department of the Interior regulations in favor of the Navajo Nation. Finding no genuine issues of material fact regarding the notice claim, the district court denied the Navajo Nation's motion for summary judgment. In addition, the district court granted the Hopi Tribe's motion for summary judgment affirming and enforcing the grazing rental determination in the amount of $1,186,190.77, minus the Navajo Nation's previous partial payment of $459,841.84.

In the same order, the district court also rejected the Hopi Tribe's motion for partial summary judgment as to the Navajo Nation's liability for prejudgment interest. The Hopi Tribe argued that payment of such interest was necessary to satisfy Congress' intent that the Navajo Nation pay the Hopi Tribe the "fair rental value" of Navajo homesites in the HPL under section 640d-15(a) of the Settlement Act. The district court found that prejudgment interest was not mandated by statute or equity and could not be assessed against the Navajo Nation absent an unequivocal waiver of its sovereign interest immunity.

In the other order, the district court granted the Hopi Tribe's motion for judgment upon and enforcement of the homesite rental determination. The district court rejected the Navajo Nation's various challenges to the validity of the assumptions and accuracy of the data underlying the

homesite rental determination. Accordingly, the district court ruled that the IBIA and the Secretary did not abuse their discretion or act arbitrarily or capriciously in upholding the BIA's homesite rental determination.

DISCUSSION

I. The Homesite Rental Determination

A. *Introduction*

The Navajo Nation's first contention of error is that the BIA abused its discretion by overlooking significant facts and making unsupported assumptions in its calculation of the homesite rental award, and that, accordingly, the district court erred in refusing to set aside the determination as arbitrary and capricious. We disagree. The record supports the district court's conclusion that the BIA, the IBIA and the Assistant Secretary considered all relevant facts, committed no clear error of judgment and established a rational connection between the facts found and the amount of the award.

Unless Congress specifies otherwise, we review agency action under the Administrative Procedure Act (the APA), 5 U.S.C. § 706(2)(A) (1982). *Tribal Village of Akutan v. Hodel*, 859 F.2d 651, 659 (9th Cir.1988). Under section 706(2)(A) of the APA, agency action shall withstand judicial review unless it is " 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.' " *Id.* (citation omitted). "The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 43, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983). Agency action passes muster under this standard of review, provided that the agency "examine the relevant data and articulate a satisfactory explanation for its action, including a 'rational connection between the facts found and the choice made.' " *Id., quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168, 83 S.Ct. 239, 246, 9 L.Ed.2d 207 (1962). We review de novo a district court's application of this standard. *Hodel*, 859 F.2d at 659.

B. *Selection of Comparables*

In its first challenge to the homesite rental determination, the Navajo Nation asserts that the "BIA did not select similar properties" and thus factored inapposite data into its capitalization of market calculations. The Navajo Nation points to various off-reservation parcels entering into the BIA's appraisal whose proximity to small towns, tourism, paved roads, utilities and other amenities allegedly made them incomparable to tracts occupied by Navajos in the HPL. The Navajo Nation asserts that these differences caused the homesite rental determination to overstate the rental value of the Navajos' more remote, barren and undeveloped homesites.

To substantiate this contention, the Navajo Nation contrasted the BIA's findings with those in its privately commissioned report. The Centerfire Report divided the Navajo homesites into three categories on the basis of proximity to water and services. After matching the Navajo homesites by category with the privately sold off-

reservation tracts, the Centerfire Report concluded that only 24 of the sales factored into the BIA appraisal involved parcels were comparable to those in the HPL.

The district court nevertheless found that "the BIA did choose comparables that were similar to the HPL tracts." Accordingly, the district court found that "the IBIA's decision that it was reasonable for the BIA not to adjust values for distance to amenities was not arbitrary and capricious and had a rational connection to the facts presented." Noting that the "ultimate standard of review is a narrow one," the district court determined after close analysis of the BIA's selection of comparables that "the Navajo Nation has presented an alternative appraisal, but has not demonstrated in any meaningful way that the BIA appraisal was incorrect."

The record supports these conclusions. Before the Navajo Nation's appeal reached the district court or even the IBIA, the BIA repeatedly reviewed and refined the homesite rental determination in response to the Navajo Nation's allegations of factual errors. The record demonstrates that the IBIA properly heard, considered and acted upon the Navajo Nation's objections and proposed alternative to the BIA appraisal before concluding that "appellant has not established that BIA's appraisals are unreasonable."

While the Hale Report and the Crossfire [sic] Report disagreed in their assessment of highway frontage and proximity to water as real estate pricing variables, such disagreement between specialists does not afford a basis for reversal of agency action. Our task on appeal is not to reweigh the relative cogency of conflicting expert views,

but to determine whether the agency acted within its discretion. *See Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378, 109 S.Ct. 1851, 1861, 104 L.Ed.2d 377 (1989) ("[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive"). The record demonstrates that the BIA did not overlook the impact of proximity to roads and water on a parcel's market value. Rather, in a manner less susceptible to second-guessing upon judicial review, *see State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866, the BIA attributed less weight to these geographical factors than the Navajo Nation advocated.

In addition, the Hale Report downplayed proximity to such services only after extensive statistical analysis – analysis the IBIA and the district court determined the Navajo Nation did not refute with statistical evidence of its own. Nor did the Navajo Nation rebut the Hopi Tribe's criticism, cited by the district court, that the Centerfire Report's appraisal rested on inapposite theories of urban property valuation. Accordingly, we conclude that the BIA's decision not to attach greater weight to these factors was the product of studied inquiry articulating "a rational connection between the facts found and the choice made." *Hodel*, 859 F.2d at 656.

C. *Inclusion of Corrals in Homesite Acreage*

The Navajo Nation next contends that the BIA overstated homesite rental values on account of four types of factual errors, including "misidentifying corrals or other

structures on grazing land as homesites." This error allegedly caused the BIA to overestimate the acreage of the HPL occupied by Navajo homesites by 129 acres. In addition, the Navajo Nation asserts that it was impermissibly double-billed for both the grazing and homesite rental value of certain remote corrals.[2]

The district court concluded that "the IBIA was not arbitrary and capricious in affirming the BIA's inclusion of corrals and grazing structures in the homesite rental determination." The district court pointed out that the BIA did not double-bill the Navajo Nation for homesite and agricultural uses of certain corrals, insofar as the grazing rental determination was based on the value of forage consumed and livestock raised rather than acreage occupied by grazing-related structures, such as corrals.

The district court also noted in support of the BIA's inclusion of corrals in the measurement of homesite acreage the BIA Relocation Commission's policy of interpreting "homesite" to include adjoining corrals when purchasing homesites from relocated Navajos under 25 U.S.C. § 640d-14(a). Finally, the district court concluded that inclusion in the homesite rental determination of corrals and other Navajo structures fairly charges the

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[2] To illustrate the "gross inequity" it has allegedly been dealt, the Navajo Nation notes that a recent on-site inspection reveals that one corral at site 077 NW 014 continues to be misidentified as a one-acre homesight [sic]. Consideration of this contention on appeal would be premature insofar as the district court has remanded this issue to the BIA for further consideration as to the appropriate designation of this site.

Navajo Nation for areas occupied by Navajo homesites from which Hopi settlers are constructively barred.

The district court's ruling on this matter was sound and, far from attributing its own reasoning to the agency officials below, solidly grounded in the administrative record. In a letter dated December 23, 1987, the Acting Area Director considered factual errors the Navajo Nation claimed had undermined the BIA's appraisal and the IBIA's decision upholding that appraisal, in *Navajo Nation v. Acting Deputy Assistant Secretary – Indian Affairs (Operations)*, IBIA 86-24-A (May 15, 1987). In this letter, the Acting Area Director explained that the BIA considered corrals to be "part and parcel of the homesites of Navajos who are awaiting relocation," in part because "the Hopi Tribe and its members are precluded from using any of the areas occupied by these corrals and other structures."

The Acting Area Director further explained that the corrals should be considered part of the homesite because the absence of forage for livestock grazing in these heavily trampled areas precluded their inclusion in the lower rent category designated "grazing areas". Finally, the Acting Area Director observed that, pursuant to the relocation compensation program administered by the BIA under 25 U.S.C. 640d-14(a), the BIA had interpreted corrals to constitute part of the "habitation and other improvements owned by [the relocated inhabitant] on the area from which he is required to move." The Acting Area Director reasonably concluded that this interpretation of section 640d-14(a) was consistent with the requirement that the Navajo Nation compensate the Hopi Tribe for such structures as homesites under section 640d-15(a).

In addition, as further explained in the Acting Area Director's letter, the IBIA took into account the Navajo Nation's objection to inclusion of corrals and double-billing for grazing and homesite use around such structures in its determination. The IBIA properly concluded that further action on this matter was not required in view of the BIA's "extensive" documentation in support of the homesite rental determination and the BIA's express willingness to correct errors when found, a willingness the record reveals to have been more than an abstract promise.

This degree of consideration, examination, review and revision does not amount to failure "to consider an import aspect of the problem" or evidence an implausibility going beyond "a difference of view". *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866-67. Accordingly, the record supports the district court's determination that the Secretary and the IBIA did not abuse their discretion in accepting the BIA's inclusion of corrals in the homesite appraisal.

D. *Inclusion of Acreage Between Homesites and Fixtures*

We also reject the Navajo Nation's related contention that the BIA should not have included in its calculation of homesite acreage land situated between the homesites and adjoining grazing structures, including windmills, pipelines and water stock tanks. This error allegedly resulted in the improper designation of 856.2 acres of grazing land as homesite acreage.

Once again, the record undermines the Navajo Nation's contention that it was the victim of administrative arbitrariness and caprice. In a letter dated May 15, 1987, the Acting Area Director informed the Navajo Nation that the homesite rental determination was based in part on the principle of exclusion, that is, the assignment to the homesite of adjoining lands encompassed by fixtures in which potential Hopi resettlers could not be expected to settle. This principle was reviewed and consistently approved and adopted throughout the Navajo Nation's series of appeals on the reasonable ground that the history of uncordial relations between the tribes made Hopi settlement amidst Navajo fixtures unrealistic.

The record further demonstrates that the application of the principle was as sound and careful as its underlying assumptions were reasonable. Pursuant to the IBIA's mandate, the BIA diligently corrected and refined calculations based on the exclusion principle to remove factual errors insofar as reasonably possible in an appraisal of such magnitude. We discern no abuse of discretion therein.

E. *The One-Acre Assumption for Homesites*

The Navajo Nation also contended that the BIA overstated by 148 acres the total acreage of Navajo homesites in the HPL by incorrectly assuming that each homesite occupied at least one acre. This assumption, the Navajo Nation alleges, arbitrarily and capriciously ran afoul of a requirement in section 640d-15(a) of the Settlement Act that the Navajo Nation be charged only for actual use. We disagree.

In rejecting this contention, the district court noted that the one-acre assumption reflected the BIA's examination of actual use of areas adjoining Navajo dwellings. As noted by the district court, the Acting Area Director explained that the BIA had considered as evidence of use the existence of a variety of appurtenant structures, including "hogans, outhouses, sunshades, sweat houses, clothes lines, mechanic tripods, corrals, fuel storage tanks, old car bodies, and sheds." In light of this examination, the Area Director concluded that "[i]n no case were we able to determine that protection of the rights and property of Navajos awaiting relocation could be accommodated with a compound of less than one acre."

Further, the IBIA rejected as "unrealistic" the Centerfire Report's estimate that the typical Navajo homesite was one-tenth of an acre "given the lifestyle of the residents." This disagreement plainly concerned a "product of agency expertise" and may fairly be "ascribed to a difference in view" between the agency and the aggrieved party. *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867. The IBIA acted within its administrative discretion in attaching greater weight to the considered and repeatedly reviewed findings of the BIA's own experts.

F. *Assessment of Rent For Abandoned Homesites*

The Navajo Nation's final contention of error with regard to the homesite rental determination is that the BIA charged it rent for abandoned homesites. The Navajo Nation raised this same contention in its administrative appeals and sought to bolster it with a list of homesites it alleged were abandoned and improperly included within

the homesite rental determination. The district court dismissed this contention after noting that the final determination was consistent with the BIA's more current homesite rolls, and that the Navajo Nation had not updated its conflicting list of homesites to reflect changes occurring since its appeal before the IBIA.

As the district court noted, the Area Director explained that the BIA did not remove from its list all homesites alleged by the Navajos to have been abandoned. The Acting Area Director justified this refusal on the basis that on-site inspections revealed that allegedly vacant buildings were locked or had been converted into storage facilities, and thus were still in use by Navajos and unavailable to Hopis.

In addition, the Acting Area Director noted that some homesites deemed abandoned in the Centerfire Report may have been among a number of homesites occupied by a single remaining Navajo family. In view of the staleness of the Navajo Nation's list of abandoned homesites, the BIA's performance of numerous on-site inspections and the BIA's adoption of reasonable factual assumptions pertaining to abandonment, we find that the Secretary's abandonment determination neither "runs counter to the evidence before the agency, [n]or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2867.

G. *Conclusion*

In short, the record supports the district court's conclusion that the BIA articulated a rational connection

between its findings of fact and the final homesite rental determination. Accordingly, we agree with the district court that this determination, and the decision of the IBIA and the Secretary upholding the homesite rental determination subject to minor corrections, was not arbitrary or capricious and did not constitute an abuse of discretion under section 706(A) of the APA.

II. The Grazing Rental Determination

The Navajo Nation next challenges on a due process ground the district court's ruling that the Assistant Secretary appropriately dismissed the Navajo Nation's appeal of the grazing rental determination for untimeliness. The Navajo Nation contends that delivery on February 19, 1985, of a copy of the Area Director's letter to the Hopi Tribe dated February 15, 1985, in an envelope addressed to the Navajo chairman, was constitutionally inadequate and breached the promise of a BIA staff attorney to send notice directly to the Navajo Nation's deputy attorney general, the tribal official assigned to the grazing rental issue.

The Navajo Nation further asserts that sufficient notice was not served prior to its tribal counsel's receipt of a letter dated April 3, 1985 from the BIA regarding the final grazing rental determination. This letter was sent pursuant to a telephone call on March 25, 1985 from Louis Denetsosie, then deputy attorney general of the Navajo Nation, to Daniel Jackson, an attorney in the Field Solicitor's Office of the Department of the Interior, reminding Mr. Jackson of the Department of the Interior's promise to send notice directly to Mr. Denetsosie's office. The

Navajo Nation contends that it filed a timely notice of administrative appeal within 30 days of receiving this notice under 25 C.F.R. § 2.10(b). We agree.

Whether notice satisfies due process is a question of law reviewed de novo. *In re Cement and Concrete Antitrust Litigation*, 817 F.2d 1435, 1440 (9th Cir.1987). We also review de novo a district court's interpretation of a federal regulation. *United States v. Semenza*, 835 F.2d 223, 224 (9th Cir.1987).

The district court concluded that the Navajo Nation was alone responsible for its failure to file a timely appeal "because the notice was internally misrouted to the wrong Navajo agency," the Navajo-Hopi Development Office. The district court deemed the photocopied letter dated February 15, 1985, to comply with the here applicable version of the regulation governing formal notice requirements, 25 C.F.R. § 2.4 (1985). The 1985 version of section 2.4 provided that:

> Notice shall be given of any action taken or decision made from which an appeal may be taken under the regulations in this part, to any Indian or Indian tribe whose legal rights or privileges are affected thereby. This notice shall be in writing and shall be given by the official making the decision or taking the action. Failure to give such notice shall not affect the validity of the action or decision, but the right of appeal

> therefrom shall continue under the regulations in this part for the periods hereinafter set forth.

25 C.F.R. § 2.4 (1985).[3]

The district court also deemed the photocopied letter of February 15 to comport with the requirements of due process. It held that delivery by regular mail to the Office of the Navajo Chairman of the photocopied letter to the Hopi Tribe "was reasonably calculated to inform the Navajo Nation and the Navajo Tribal Chairman of the determination."

The district court then ruled that the Navajo Nation, in neglecting to file a timely notice of appeal after receiving adequate notice, failed to exhaust administrative remedies under 25 C.F.R. § 2.3(b). In doing so, the Navajo Nation failed to meet a prerequisite for judicial review of final agency action under section 704 of the APA, the district court held. Section 2.3(b) provides that an administrative decision shall only be considered final and subject to judicial review when no administrative avenue of appeal remains open or the officer appealed to rules that the decision is immediately effective. 25 C.F.R. § 2.3(b). The district court concluded that the grazing rental determination was final but nevertheless not appealable under section 2.3(b) in the absence of a timely notice of appeal. *See* 25 C.F.R. § 2.10(b) (1985) ("[n]otices of appeal which are not timely filed will not be considered, and the case will be closed.").

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[3] In 1989, the regulations were amended to require that the notice include a statement of the 30-day limit for filing an appeal. 25 C.F.R. § 2.7.

The applicable regulations specify that the notice shall be "in writing", but are otherwise silent as to the required content of a notice of an agency decision or action. 25 C.F.R. § 2.4 (1985). In the absence of a more specific and exacting notice requirement in the regulations, we direct our inquiry to whether the Area Director's February 15 letter reached the minimum threshold for notice under the Due Process Clause of the Fifth Amendment. *See Whetstone v. INS*, 561 F.2d 1303, 1306, n. 3 (9th Cir.1977), *citing Jarecha v. INS*, 417 F.2d 220, 225 (5th Cir.1969). Under the Court's classic formulation of the due process standard in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950), "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties" of the ruling or action. More specifically, "[t]he means employed must be such as one desirous of actually informing the [party to be noticed] might reasonably adopt to accomplish it." *Id.* at 315, 70 S.Ct. at 657.

The photocopied letter of February 15 fell short of the mark both in design and implementation. "At what point the party to be affected by the notice should have been put upon inquiry as to the contents of the notice is an ordinary question of fact, fully dependent upon the then surrounding circumstances." *NLRB v. Vapor Recovery Systems Co.*, 311 F.2d 782, 786 (9th Cir.1962). Given the size and bureaucratic complexity of the Navajo Nation and the narrowness of the timetable for appeal under 25 C.F.R. § 2.10, the Navajo Nation's untimely reaction to the

purported notice was the foreseeable result of shortcomings in the February 15 letter and the BIA's departure from both agreed and, as discussed below, prior procedure. In light of the letter's salutation to a third party, the Hopi Tribe, and the absence of potentially off-setting safeguards beyond those which delivery by regular mail affords, here, as in *Mullane*, it cannot be said that the "chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." 339 U.S. at 315, 70 S.Ct. at 657. Rather, as in *Mullane*, the party to be noticed was unable, for reasons attributable to and foreseeable by the notifying agency, to act upon the purported notice promptly because the letter was not "of such nature as reasonably to convey the required information . . . [and] afford a reasonable time for those interested to make their appearance" or objection. *Id.* at 314, 70 S.Ct. at 657.

The photocopied letter of February 15 raised the unfortunate prospect that the recipient would misapprehend the letter's import, mistakenly assume the letter was misaddressed or otherwise fail to be meaningfully informed by it in a timely manner. This prospect became an unreasonably high probability in light of assurances evidently given by a Department of the Interior official, but ignored until the telephone call from the Navajo deputy attorney general, that the BIA would deliver notice of the final grazing rental determination directly to the Navajo Nation's tribal counsel. This promise accorded with the more robust measures adopted by the BIA to notify the Navajo Nation of a preliminary grazing rental determination in October 1984, including hand-delivery to the Navajo Nation of the notice and simultaneous

consultations with BIA officials. Given the BIA's status as a trustee "subject to the United States' fiduciary responsibilities toward Indian tribes," *Covelo Indian Community v. FERC*, 895 F.2d 581, 586 (9th Cir.1990), the Area Director's fulfilment of this promise could reasonably be expected and relied on to a greater extent than would be the case in a run-of-the-mill administrative proceeding involving a more arms-length relationship between the agency and the promisee. In this light, the BIA should have foreseen that these assurances would induce a justifiable but false sense of security in Navajo officials.

In support of the district court's ruling, the Hopi Tribe contends that even if the February 15 letter was insufficient notice, the Navajo Nation received – and neglected to respond in a timely manner to – actual notice of the grazing rental determination soon thereafter. Indeed, the record indicates that the Navajo Nation received actual notice of the final grazing rental determination on March 25, 1985, the date of the telephone conversation in which an attorney for the Department of the Interior apprised Navajo counsel of the final rental determination. This actual notice, the Hopi Tribe asserts, started the 30-day clock for administrative appeals under 25 C.F.R. § 2.10(a),[4] which then expired prior to the Area

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[4] This regulation provides in relevant part that:

(a) A notice of appeal shall be in writing and filed in the office of the official who made the decision that the appellant wishes to appeal . . . The notice of appeal must be received in the office of the official who made the decision within 30 days after the date notice of the decision complained of is received by the

Director's receipt of the Navajo Nation's notice of appeal on May 2, 1985.

To buttress this alternative argument, the Hopi Tribe cites our decision in *Vapor Recovery* for the proposition that "[w]here the giving of written notice is required. . . . it is sufficient to show that the party to be notified received *actual written notice*, the means being employed being unimportant." 311 F.2d at 785 (emphasis added).[5] However, *Vapor Recovery* does not support this argument or the district court's ruling because here the party to be notified, the Navajo Nation, did not fail to file a timely notice of appeal after receiving actual written notice of the agency decision. While it is clear and largely undisputed that the March 25 telephone call constituted actual notice, in specifying notice "in writing", section 2.10(a)

> appellant, together with all supporting documents. . . .
>
> (b) No extension of time will be granted for filing of the notice of appeal. Notices of appeal which are not timely filed will not be considered, and the case will be closed.

25 C.F.R. § 2.10 (1985).

[5] Nor does *Vapor Recovery* support the Hopi Tribe's argument that the February 15 letter gave sufficient notice notwithstanding the Navajo Nation's failure to route the letter promptly to concerned officials. To be sure, in *Vapor Recovery* we noted that the cooperation of the party noticed in opening and reading the notice "is an element beyond the control of the party giving the notice and should not be a factor in judging the adequacy of this performance." 311 F.2d at 786. But the instant case does not involve failure of this sort, either through intransigence or neglect. Navajo officials expeditiously opened and read the notice but, as in Vapor Recovery, the method chosen did not "succeed in imparting knowledge of its contents." *Id.*

required more. In that conversation, Navajo counsel requested formal notice. The request was immediately agreed to but, crucially for purposes of the 30-day timetable for appeal in section 2.10(a), was only fulfilled upon the arrival of the written notice requested several days later.

We conclude that the BIA first afforded the Navajo Nation written notice complying with the requirements of both due process and applicable regulations by means of the Area Director's letter, dated April 3, 1985, in response to the Navajo deputy attorney general's request for formal notice. In accordance with 25 C.F.R. § 2.10(a) (1985), the Navajo Nation filed its notice of appeal, dated April 29, 1985, and received by the Area Director on May 2, 1985, within 30 days of receiving notice of the final grazing rental determination from the Area Director. Illustratively, the address on the envelope and the salutation on the letterhead of the letter of April 3, 1985, were reasonably designed to guide the notice of the final grazing determination to its intended and appropriate destination, the Navajo Nation's tribal council. In contrast with the ill-directed letter of February 15, this notice clearly and promptly achieved its intended purpose.

Viewing "all the circumstances" as required under *Mullane, id.*, and *Vapor Recovery*, 311 F.2d at 786, we hold that the photocopied letter dated February 15, 1985 did not constitute legally sufficient notice to the Navajo Nation of agency action under the Due Process Clause of the Fifth Amendment.[6] The Navajo Nation filed a timely

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[6] Having found the notice to fall short of due process and regulatory requirements, we need not consider the Navajo

notice of appeal of the grazing rental determination within 30 days of receiving notice thereof under 25 C.F.R. § 2.10(a). Accordingly, the district court erred in ruling that it lacked jurisdiction to review the grazing rental determination under section 704 of the APA.

III. Prejudgment Interest

In its cross-appeal the Hopi Tribe contends that the district court erred in refusing to award it prejudgment interest on the grazing rental determination. We agree.

The decision to grant prejudgment interest ordinarily "rests within the discretion of the district court." *U.S. Dominator Inc. v. Factory Ship Robert E. Resoff*, 768 F.2d 1099, 1106 (9th Cir.1985) (citation omitted). However, whether Congress statutorily waived an Indian tribe's sovereign immunity is a question of statutory interpretation. We review a district court's interpretation of a statute de novo. *Rosenfeld v. United States*, 859 F.2d 717, 725-26 (9th Cir.1988).

Where, as here, an issue arises as to whether Congress has exercised its plenary power to waive the sovereign immunity of an Indian tribe, "[i]t is settled that a waiver 'cannot be implied but must be unequivocally expressed.' " *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d 106 (1978) (citation

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Nation's alternative argument that by giving the Hopi Tribe more ample notice of the final grazing rental determination, the Secretary violated his fiduciary duty to the Navajo Nation, pursuant to the United States' trust responsibility to Indian tribes, to treat the tribes equally.

omitted); *see also, Evans v. McKay*, 869 F.2d 1341 (9th Cir.1989).[7] The district court found that the Settlement Act does not mention prejudgment interest expressly, either in section 640d-15(a), mandating payment of rent, section 640d-17(c), authorizing additional actions to insure quiet enjoyment of reservation lands, or section 640d-17(e), authorizing recovery of all remedies provided for in the Federal Rules of Civil Procedure or otherwise available in federal district courts. Accordingly, the district court ruled that Congress' failure expressly to waive the Navajo Nation's immunity from prejudgment interest precluded a grant of such relief.

In examining the text and purpose of the Settlement Act, we bear in mind the Court's admonition against "crabbed construction" of statutes waiving sovereign immunity in *Franchise Tax Bd. of Cal. v. U.S. Postal Service*, 467 U.S. 512, 521, 104 S.Ct. 2549, 2554, 81 L.Ed.2d 446 (1984). In that case the Court liberally interpreted the "sue-and-be-sued" provision in 39 U.S.C. § 401(1) to

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[7] The Hopi Tribe contends that under *Missouri v. Jenkins*, 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989), "strict construals of waivers of sovereign immunity as to interest apply only to waivers of the United States' own immunity," insofar as only the United States has historically benefitted from a "no-interest rule" and its corollary "ultrastrict canon of construction." *See id.* at 281, n. 3, 109 S.Ct. at 2468, n. 3. We read the Settlement Act to include a waiver of any tribal interest immunity in terms sufficiently unequivocal to pass muster even under the strict interpretive standard set forth in *Santa Clara Pueblo* and *McKay*. Accordingly, we need not consider whether a less stringent canon of construction applies here or determine whether Indian tribes enjoy sovereign interest immunity equivalent to that of the United States.

require the U.S. Postal Service to accede to the order of California tax authorities to withhold the wages of postal employees who were delinquent in paying state income taxes. *Id.* at 524-25, 104 S.Ct. at 2556. The Court instructed that "waiver of sovereign immunity is accomplished not by a 'ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Id.* at 521, 104 S.Ct. at 2554, *citing Keifer & Keifer v. Reconstruction Finance Corp.*, 306 U.S. 381, 389, 59 S.Ct. 516, 517-18, 83 L.Ed. 784 (1939).

The district court's reading of the Settlement Act falls afoul of this interpretive guidance. Examining the Settlement Act de novo and in light of *Franchise Tax Bd.*, we conclude that Congress unequivocally waived any tribal immunity from prejudgment interest by authorizing the two tribes to pursue all remedies available in federal district court in actions to enforce or collect judgments obtained pursuant to the Settlement Act. *See* 25 U.S.C. § 640d-17(e). The district court's contrary interpretation of the Settlement Act disregards the clear import of Congress' broad authorization of remedies in section 640d-17(e) and contravenes the overriding congressional purpose behind the Settlement Act, full compensation to the Hopi Tribe for the fair rental value of Navajo-occupied lands. *See* 25 U.S.C. § 640d-15(a).

Section 640d-17(e), entitled "Remedies", provides that:

> [a]ll applicable provisional and final remedies provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of

> judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this subchapter.

25 U.S.C. § 640d-17(e). This blanket authorization of "all remedies available" in federal district courts necessitates some inquiry into what damages and costs are currently recoverable there. But in requiring this wide-ranging inquiry, the statutory language does not *ipso facto* render the congressional waiver of tribal interest immunity therein equivocal. Rather than compile an exhaustive list of currently available remedies and add a clause authorizing additional remedies upon their introduction in federal court, section 640d-17(e) reasonably relies on a more general formulation that accomplishes the same result with equal clarity and far greater efficiency.

Further, in keeping with the criterion for authorization under section 640d-17(e), prejudgment interest is plainly a remedy currently available in federal district courts. Prejudgment interest has become a familiar remedy widely recognized by federal courts as a means to make a plaintiff whole against a dilatory defendant. *See, e.g., General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655, 103 S.Ct. 2058, 2062, 76 L.Ed.2d 211 (1983); *Partington v. Broyhill Furniture Industries*, 999 F.2d 269, 274 (7th Cir.1993) ("[m]oney has a time value, and prejudgment interest is therefore necessary in the ordinary case to compensate a plaintiff fully for a loss suffered at time t and not compensated until t + 1 . . . "). Moreover, prejudgment interest is a well-established remedy in this circuit. *See, e.g., Home Savings Bank, F.S.B. v. Gillam*, 952 F.2d 1152, 1161 (9th Cir.1991); *U.S. Dominator*, 768 F.2d at

1106 ("[p]rejudgment interest is awarded so that the award will reflect the present value of plaintiff's claim"). In light of the widespread acceptance of prejudgment interest, only by an untenably "crabbed construction" of the Settlement Act could section 640d-17(e) be read to exclude prejudgment interest for failure to recite exhaustively that which is authorized lest it be forbidden. *See Reopell v. Mass.*, 936 F.2d 12, 15 (1st Cir.1991); *accord Pegues v. Miss. State Employment Service*, 899 F.2d 1449, 1454 (5th Cir.1990) ("Congress did not limit the tools with which courts could fashion relief").

In support of its denial of prejudgment interest on the grazing rental determination, the district court cited Congress' express authorization of interest in 25 U.S.C. § 640d-17(a)(1) and (a)(2), mandating an accounting between the tribes of various fees collected by them in the Joint Use Area.[8] The district court reasoned that if Congress had intended to waive tribal sovereign immunity generally in actions brought pursuant to the Settlement Act, it would have drafted the general remedy provision in section 640d-17(e) to authorize prejudgment interest in similarly express terms.

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[8] Section 640d-17(a)(1) requires an accounting between the tribes of trader license fees, lease proceeds and similar charges collected by the tribes for agricultural uses of the pre-partition Joint Use Area after September 1957. Section 640d-17(a)(2) requires compensation to each tribe for the "fair value" of the other tribe's grazing and agricultural activities in the Joint Use Area after September 1962. Under both, the collecting tribe must remit to the other tribe an equal portion of such pre-partition monies, plus back interest compounded at 6% per annum.

The Hopi Tribe counters that sections 640d-17(a)(1) and (a)(2) are distinguishable from the authorization of post-partition rent under section 640d-15(a) and the recovery of prejudgment interest on late grazing rental payments under section 640d-17(e). It argues that "[i]n both § 640d-17(a)(1) and (a)(2), Congress mandated the awarding of interest because at the time it enacted the Settlement Act, it knew there would be an award, that the award was past due, and that the award would be a liquidated, determinable sum." In contrast, under section 640d-17(a)(3), Congress expressly provided that each tribe would be compensated "without interest" for damage done to the Joint Use Area by the other tribe, an uncertain amount less amenable to precise proof and an annual accounting.

We agree that section 640d-15(a), neither expressly requiring nor proscribing an award of interest, falls in between these statutes and is subject to the general and sufficiently unequivocal remedy provision set forth in section 640d-17(e). Indeed, in sections 640d-17(a)(1) and (a)(2), Congress retrospectively mandated apportionment of reasonably ascertainable monies already collected by one tribe and owed to the other. In contrast, section 640d-15(a) prospectively authorized recovery of post-partition rent that Congress knew would be owed in some then uncertain amount, but had no cause to suspect would be paid only after protracted settlement efforts and lengthy litigation. Accordingly, upon its passage of the Settlement Act, Congress could not know that interest would have to be added to this award to make the Hopi Tribe whole for the lost time value of future rents

untimely paid by the Navajo Nation pursuant to section 640d-15(a).

The district court underestimated the latitude left to the courts to award full compensation for delays in rental payments made under section 640d-15(a). "Courts may allow prejudgment interest even though the governing statute is silent" to compensate a prevailing plaintiff for the defendant's delay in payment. *Frank Music Corp. v. Metro-Goldwyn Mayer Inc.*, 886 F.2d 1545, 1550 (9th Cir.1989), *cert. denied*, 494 U.S. 1017, 110 S.Ct. 1321, 108 L.Ed.2d 496 (1990). Where, as here, the governing statute is not silent but sweeping in its authorization of remedies encompassing prejudgment interest, our discretion to fashion such relief is at least as broad. While section 640d-15(a) does not address interest awards, section 640d-17(e) explicitly expresses Congress' intention that, in the event of litigation to enforce or collect a judgment under the Settlement Act, federal courts shall have at their disposal the full panoply of remedies and processes available therein, including prejudgment interest.

The general congressional purpose evident in section 640d-15 reinforces this conclusion. *See Franchise Tax Bd.*, 467 U.S. at 521, 104 S.Ct. at 2554 (scope of waiver of sovereign immunity is gauged "by reference to underlying congressional policy"). Following *Jenkins*, other courts have recognized that where Congress intends to afford complete compensation, prejudgment interest is necessary to promote this intent notwithstanding the dilatory defendant's sovereign interest immunity defense. *See Reopell*, 936 F.2d at 17 ("[w]hile . . . Congress did not

expressly provide for the inclusion of prejudgment interest in an award under the VRRA, such interest has commonly been implied by the courts as being necessary to carry out Congress' purpose to make a veteran whole"). *Pegues*, 899 F.2d at 1453 ("interest is an item that '*should be* included in back pay' to make a victim whole") (emphasis in original) (citation omitted).

We are persuaded that Congress intended to make the Hopi Tribe whole under section 640d-15(a) of the Settlement Act by entitling it to the "fair rental value" of Navajo use of the HPL. Prejudgment interest is essential to the achievement of that purpose. Accordingly, we reverse the district court's denial of prejudgment interest on the grazing rental determination and remand for a determination of the amount of such interest owed under sections 640d-15(a) and 640d-17(e).

CONCLUSION

We affirm the judgment of the district court upholding the homesite rental determination. We reverse the district court's dismissal of the Navajo Nation's motion for review of the grazing rental determination and denial of its motion for summary judgment regarding the timeliness of its notice of administrative appeal. In addition, we reverse the ruling of the district court denying the Hopi Tribe prejudgment interest on the grazing rental determination and remand for a determination of prejudgment interest owed by the Navajo Nation thereon.

AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

The parties shall bear their own costs in this appeal.

UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

THE HOPI INDIAN TRIBE,

Plaintiffs

V.

THE NAVAJO TRIBE,

Defendants

JUDGMENT IN A CIVIL CASE

(Filed July 6, 1992)

CASE NUMBER:
CIV-85-801-PHX-EHC
CIV-87-1966-PHX-EHC
(Consolidated)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the Hopi Tribe's motion for judgment upon enforcement of rental determination is granted. Partial judgment pursuant to Rule 54(b) in the amount of $1,186,190.77, minus the partial payment of $459,841.84, for a total of $726,348.93, the Court finding that there is no reason for delay.

July 6, 1992
Date

RICHARD H. WEARE
Clerk

/s/ Illegible
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

THE HOPI TRIBE, Plaintiff, v. THE NAVAJO TRIBE, Defendant.	CIV 85 – 801 PHX EHC CIV 87 – 1966 PHX EHC (Consolidated)
THE NAVAJO TRIBE, et al. Plaintiffs, v. THE UNITED STATES OF AMERICA, et al. Defendants.	ORDER re: 1979-1984 Grazing Rental Determination and Hopi Motion for Partial Summary Judgement [sic] re: Prejudgment Interest (Filed July 6, 1992)

This case involves two consolidated actions pertaining to the payment of rent by the Navajo Nation[1] to the Hopi Tribe for post-partition use of the Hopi Partitioned Lands (HPL) by members of the Navajo Nation. The first cause, CIV 85-801 PHX EHC, was filed by the Hopi Tribe

[1] The Navajo Tribal Code, 1 N.T.C. § 301, requires officials of the Navajo Tribe to use the term "Navajo Nation" rather than "Navajo Tribe." Throughout this Order, the Court will use the term employed by the Navajos.

to obtain declaratory relief compelling the Secretary of the Department of the Interior ("DOI") to determine the fair rental value of Navajo use of the HPL since partition and to collect such rent from the Navajo Nation. The second action, CIV 87-1966 PHX EHC, was filed by the Navajo Nation to obtain judicial review of the final rental determination for Navajo use of the HPL for grazing purposes from 1978 to 1984[2] and challenging the dismissal of the Navajo Nation's administrative appeal of that determination. On September 23, 1988, these cases were consolidated.

There are a number of motions pending regarding the 1979-84 rental determinations for use of the HPL for grazing ("BIA.NH.1") and residence and farming ("IBIA 86-24-A"), and the single combined rental determination for all Navajo use of the HPL (grazing, residence and farming) for 1985 ("BIA.NH.2").

This Order will resolve all issues relating to the 1979-84 grazing rental determination, BIA.NH.1. The Navajo Nation has filed a Motion for Summary Judgment regarding the dismissal of its administrative appeal, and the Federal Government has filed a Motion to Dismiss the Navajo action challenging the dismissal of the Tribe's administrative appeal (CIV 87-1966), or in the alternative, a Cross-Motion for Summary Judgment. In addition, in CIV 85-801, the Hopi Tribe has filed a Motion for Judgment Upon and Enforcement of the Grazing Rental Determination and the Navajo Nation has filed a Motion for

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[2] The parties subsequently stipulated that the date of partition was April 18, 1979. All rental determinations have thus been revised to reflect this date.

Review of that determination. Finally, the Hopi Tribe has filed a Motion for Partial Summary Judgment as to the Navajo Nation's liability for prejudgment interest.

FACTUAL BACKGROUND

The Navajo-Hopi Settlement Act, P.L. 93-531, as amended 25 U.S.C. § 640d, *et seq.* (1980), requires the Navajo Nation to pay the Hopi Tribe the fair rental value of Navajo use of the HPL subsequent to partition, as determined by the Secretary of the Interior. *See* 25 U.S.C. § 640d-15(a). On May 16, 1980, a rental determination was issued for all Navajo uses of the HPL in 1978 and 1979. Both tribes filed administrative appeals with respect to the grazing rental determination and methodology, and final decisions on these appeals were rendered on October 25 and 29, 1982.[3] (Administrative Record ("AR"), at Tabs 1 and 2). The Navajo Nation filed a Motion for Reconsideration, which was denied on June 22, 1983. (AR, Tabs 6-10). No actions for judicial review were filed on these decisions.

Subsequent to resolution of these appeals, revised rental determinations were made for grazing during the period from 1978 to 1984.[4] On October 26, 1984, the Navajo Nation was informed of a preliminary rental

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[3] The appeals on other uses of the HPL, particularly homesite and farming, were deferred and later decided by the Interior Board of Indian Appeals (IBIA), in IBIA 86-24-A. Motions for Review and Judgment as to these determinations are also pending in this case.

[4] As stated previously, all rental determinations have been revised to reflect the stipulated April 18, 1979 partition date.

determination for Navajo grazing use of the HPL from 1978 to 1984.[5] (AR, Tab 13). The Area Director met with representatives from both tribes to discuss the preliminary grazing rental determination prior to issuing the final determination. (AR Tabs 14-16). On February 15, 1985, the Area Director issued the final decision and sent a letter to the Hopi Tribe, stating that the Navajo Tribe owed the Hopi Tribe $1,328,025.77 for grazing from 1978-1984.[6] (AR Tab 17). This amount was subsequently changed to $1,186,190.77 to reflect the April 18, 1979 stipulated partition date.

The same letter (addressed to the Hopi Chairman) was also mailed to the Office of the Chairman of the Navajo Nation. Although records of the Navajo Nation show that this letter was received in the Chairman's office on February 19, 1985, it was not directed to the Office of the Attorney General of the Navajo Nation. Rather, it was routed to the Tribe's Navajo-Hopi Development Office, where it was misplaced. On about March 25, 1985, the Office of the Attorney General of the Navajo Nation discovered that the determination had been issued but had not been received in that office, and requested that "proper" notice be provided to the Navajo Nation.[7] On April 3, 1985, the Area Director sent an

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[5] Notice was provided by a letter addressed to the Navajo Chairman, with a copy to the Hopi Chairman. The use of the same procedure, in reverse, is the subject of the Navajo's challenge to the dismissal of its administrative appeal.

[6] A copy of the determination was also hand-delivered to the Hopi Chairman by the Superintendent of the BIA Hopi Agency.

[7] Louis Denetsosie, Deputy Attorney General for the Navajo Nation, submitted an affidavit stating that he had

additional letter, this time addressed to the Navajo Chairman, containing the same information and further stating that notice had been previously sent to the Navajo Chairman in February, 1985. (AR, Tab 18).

Both tribes filed notices of appeal – the Navajo Nation on April 29, 1985, and the Hopi Tribe on May 1, 1985. (AR, Tabs 20 and 21). The Navajo Nation filed a Motion to Dismiss the Hopi appeal because the Hopi's Notice of Appeal was not filed within the 30 day period provided in 25 C.F.R. § 2.10. (AR, Tab 28). The motion was granted on January 13, 1986. (AR, Tab 47). In December 1986, the Hopi Tribe filed a Motion to Dismiss the Navajo appeal on grounds that it too was untimely, since the Navajo Nation had been mailed a copy of the original letter addressed to the Hopi Chairman in February, 1985. (AR, Tab 49). The Navajo Nation argued that it had filed its appeal within 30 days of receipt of "proper" notice on April 3, 1985. After the Navajo Nation admitted that the original letter had been received and routed to the wrong tribal office, (AR, Tab 51), the Navajo appeal was also dismissed on February 24, 1987. (AR, Tab 60). The Navajo Nation filed a Motion for Reconsideration on May 6, 1987, which was denied on May 8, 1987. (AR. Tabs 63 and 64). The Navajo Nation then filed its complaint in the United States District Court for the District of Columbia challenging the decision dismissing its administrative appeal, and the case was transferred to this District.

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requested that the government send the rental determination directly to him. AR Tab 51, and Ex. A thereto.

DISCUSSION

I. Navajo Nation's Motion for Summary Judgment

Regulations of the Department of the Interior, Bureau of Indian Affairs ("BIA"), 25 C.F.R. Part 2, "provide appeals procedures for requesting correction of actions or decisions by officials of the Bureau of Indian Affairs." 25 C.F.R. § 2.2 (1985). Any interested party adversely affected by a decision of an Area Director has a right to appeal, unless the decision was approved by the Secretary before it was made. 25 C.F.R. § 2.3(a) (1985). If no appeal is timely filed, the decision is final for the Department. 25 C.F.R. § 2.3(b) (1985). In order to assure exhaustion of administrative remedies before resort to judicial review, the regulations provide that a decision which is subject to appeal to a superior authority within the Department at the time it is rendered is not considered final agency action so as to be subject to judicial review under the Administrative Procedures Act ("APA"), 5 U.S.C. § 704. 25 C.F.R. § 2.3(b) (1985). "[W]hen a statute or agency rule dictates that exhaustion of administrative remedies is required, the federal court may not assert jurisdiction to review agency action until the administrative appeals are complete." *White Mountain Apache Tribe v. Hodel*, 840 F.2d 675, 677 (9th Cir. 1988); *Joint Bd. of Control of Flathead Irrigation District v. United States*, 862 F.2d 195 (9th Cir. 1988); *See also, Faras v. Hodel*, 845 F.2d 202, 204 (9th Cir. 1988) (exhaustion of appeal procedures is a jurisdictional prerequisite to judicial review). Thus, if the Navajo Nation's Notice of Appeal was not timely, there is no jurisdiction for this Court to review of the 1979-1984 grazing rental determination.

The Navajo Nation filed a Motion for Summary Judgment contending that as a matter of law the dismissal of the Navajo Nation's administrative appeal as untimely was in error and unlawful in that: (1) it failed to afford the Navajo Nation appellate rights provided by BIA regulations, (2) it failed to provide fundamental due process rights, and (3) it violated the United States' trust responsibilities to the Navajo Nation. The Navajo Nation seeks remand to the DOI for full administrative consideration of the merits of their appeal.

(1) Notice under BIA Regulations

BIA regulations pertaining to administrative appeals include provisions relating to the notice which is to be provided of appealable agency decisions. 25 C.F.R. § 2.4 (1985) provides:

> Notice shall be given of any action taken or decision made from which an appeal may be taken under the regulations in this part, to any Indian or Indian tribe whose legal rights or privileges are affected thereby. This notice shall be in writing and shall be given by the official making the decision or taking the action. Failure to give such notice shall not affect the validity of the action or decision, but the right to appeal therefrom shall continue under the regulations in this part for the periods hereinafter set forth.

The Area Director provided written notice to the Navajo Nation of his determination by mailing a copy of the letter addressed to the Hopi Chairman to the Office of the Navajo Chairman.

The Navajo Nation contends that the letter is not adequate notice under the regulations for various reasons, including: (1) the notice was not hand-delivered to the Tribal Chairman's office; (2) it was not sent to the Navajo Attorney General's Office; (3) it was not addressed to the Navajo Tribal Chairman; (4) it was not an original; (5) it was not delivered in the same manner as to the Hopi Tribe; and (6) it did not contain language regarding the right to appeal the decision.

However, in 1985, section 2.4 did not impose any of these requirements on the government.[8] In contrast, section 2.11 required personal service or service by certified/registered mail of appeal documents on the principal or designated tribe official. Section 2.4 simply provides for "written notice".

The Navajo Nation contends that the BIA admitted that its notice did not comply with the regulations by its subsequent notice in the form of an original addressed to the Navajo Chairman. This argument is not persuasive. The decision of the BIA to provide additional notice to the Navajo Nation was upon request of the Navajo Nation and does not constitute an admission of noncompliance with regulations. The subsequent notice itself stated that notice had already been provided.

The notice received by the Navajo Nation was thus sufficient under the applicable BIA regulations, and the

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[8] In 1989, the regulations were changed to require written notice by personal delivery or mail, and that it include a statement of the 30-day time limit for filing an appeal. 25 C.F.R. § 2.7 (1989). The regulations still allowed notice by mail and did not specify to whom delivery was required.

Navajo Nation is not entitled to summary judgment on this ground.

(2) Due Process Requirements

Due process requires that the parties whose rights are adversely affected by a decision be afforded proper notice of the administrative action. *Brandt v. Hickel*, 427 F.2d 53, 56 (9th Cir. 1970). As to the type of notice that is required, "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed. 1230 (1961). The Supreme Court set out the basic due process requirement as follows:

> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and to afford them an opportunity to present their objections. [Citations omitted]. The notice must be of such a nature as reasonably to convey the required information . . . and it must afford a reasonable time for those interested to make their appearance. [Citations omitted].

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *see also Gonzalez v. Sullivan*, 914 F.2d 1197, 1203 (9th Cir. 1990); *Harris v. County of Riverside*, 904 F.2d 497, 503 (9th Cir. 1990). If the administrative decision is "a reasoned conclusion clearly apprising [parties] of the action taken, thus enabling

them to determine whether their interests were adversely affected," the notice was proper. *Brandt*, 427 F.2d at 56.

The Navajo Nation contends that the notice it received is inadequate under due process standards because: (1) the notice was not personally addressed to the Navajo Chairman; (2) the notice was not personally served on the Navajo Chairman like it was on the Hopi Chairman; and (3) it did not contain language advising the Tribe of its right to appeal within 30 days. In view of the circumstances and the requirements of due process, none of these arguments is persuasive.

The Navajo Nation's contention that procedural due process requires notice by letter specifically addressed to the Navajo Chairman is without merit. The Supreme Court held in *Mullane* that notice must be reasonably calculated to reach the interested party. A copy of the letter of determination from the Area Director, although addressed to the Hopi Chairman, was delivered to the Office of the Navajo Chairman by regular mail. This was reasonably calculated to inform the Navajo Nation and the Navajo Tribal Chairman of the determination, and due process requires no more.

Due process also does not require notice by personal service upon the Navajo Chairman. Notice by mail is sufficient if the notice reasonably conveys the required information. *See Mennonite Board of Missions v. Adams*, 462 U.S. 791, 800, 103 S.Ct. 2706, 2712, 77 L.Ed. 180 (1983); *Katzson Bros., Inc. v. United States E.P.A.*, 839 F.2d 1396, 1400 (10th Cir. 1988). Here, the Office of the Chairman of the Navajo Nation received by regular mail a copy of the letter stating the Director's determination that the Navajo Nation owed the

Hopi Tribe a specified amount for grazing in a specified period. The Director provided notice by the same method to the Hopi Tribe.[9] This method of service was sufficient under due process standards. *See NLRB v. Vapor Recovery Systems Co.*, 311 F.2d 782 (9th Cir. 1962) (even if personal service is preferable or required by statute, actual notice through receipt of first class letter is sufficient). As the Ninth Circuit has noted, successful achievement of notice depends on actions taken by both parties:

> A measure of cooperation of the party noticed is necessary for [accomplishment of actual notice]. The notice must be read. This is an element beyond the control of the party giving the notice and should not be a factor in judging the adequacy of his performance. When all facts are considered and it appears that enough has been done by the party attempting to give notice to put the party to be affected on inquiry into the contents of the notice which he has in his hands, it should be held that notice has been given.

Vapor Recovery Systems, 311 F.2d at 786.

Finally, the Navajo Nation contends that the notice it received violates due process in view of the absence of language stating the right to appeal the determination and the time for filing such appeal.[10] The failure to

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[9] The fact that a lower official in the Department also provided personal service of the notice to the Hopi Chairman is not relevant to the adequacy of the notice provided by the Director, who is required by the Department Regulations to provide written notice.

[10] The letter received by the Navajo Nation on April 3, 1985, from which it contends it timely appealed, also contains no reference to appeal procedures. (AR, Tab 18).

mention appeal rights in a notice of decision is not grounds for reversing agency action when the parties are familiar with these rights and have participated in the process. *Vance v. Block*, 635 F.2d 163, 169 (D. Mont. 1986), *rev'd in part and dism'd in part on other grounds, Save the Yaak Committee v. Block*, 840 F.2d 714 (9th Cir. 1988). The parties here were clearly familiar with proper administrative proceedings and their appellate rights, and had in fact appealed the original 1980 rental determination. The Navajo Nation was familiar with its rights pertaining to appeal and was not prejudiced by the absence of such information in the notice. The Navajo's failure to file a timely appeal did not occur because of lack of knowledge as to the time in which to appeal, but because the notice was internally misrouted to the wrong Navajo agency.

This Court finds that there has been no violation of due process.[11]

(3) United States' Trust Responsibilities

Finally, the Navajo Nation contends that the Assistant Secretary violated the Government's trust responsibilities to the Navajo Nation, arguing that the Assistant Secretary has an obligation to interpret its regulations liberally in favor of the Navajo Nation.

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[11] In addition to receiving the original notice in February 1985, the Navajo Nation had actual notice of the decision on or about March 26, 1985, when it requested formal "proper" written notice. The Navajo appeal was also not timely as to that date.

This argument ignores the fact that the Secretary would also owe the same trust responsibility to the Hopi Tribe. A liberal interpretation of the regulations to permit an untimely Navajo appeal arguably violates any trust responsibilities owed to the Hopi Tribe. The Navajo's argument that *Jicarilla Apache Tribe v. Andrus*, 728 F.2d 1555, 1567 (10th Cir. 1984), mandates that the Secretary must choose alternatives available that best serve the interest of "an Indian tribe", is inapplicable in a case where the interests of two Indian tribes are in conflict.

Further, the Navajo Nation has made no effort to explain by what mechanism this trust responsibility arises. It is clear that there is an "undisputed existence of a general trust relationship between the United States and the Indian people." *Mitchell II*, 463 U.S. 206, 225, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983). However, this general trust relationship does not automatically translate into the existence of an Indian cause of action. *See Mitchell I*, 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980). The Navajo Nation has not cited any treaty, statute, agreement or order which creates any duties by the United States to interpret its regulations in favor of the Navajo Nation and has not demonstrated evidence of a Congressional intent to create such a trust responsibility. *See Begay v. United States*, 16 Cl. Ct. 107 (1987), *aff'd*, 865 F.2d 230 (Fed. Cir. 1988). In fact, the regulations are quite explicit that no extensions of time may be granted for filing an appeal. 25 C.F.R. § 2.10(b) (1985).

This Court finds that the Department of Interior does not have a trust responsibility to the Navajo Nation to interpret its regulations "liberally in favor of the Navajo Nation."

Conclusion

There are no genuine issues of material fact regarding the adequacy of the February 15, 1985, notice to the Navajo Nation. As a matter of law, the notice provided was sufficient under BIA regulations and did not violate due process or any trust responsibility. The Secretary therefore properly dismissed the Navajo Nation's appeal, and the Navajo Nation's Motion for Summary Judgment and Motion for Review of Rental Determination in BIA-NH-1 will be denied.

II. United States' Motion to Dismiss/Motion for Summary Judgment

The United States moves to dismiss the Navajo's challenge to the dismissal of the administrative appeal on the basis that the Navajo Nation failed to exhaust its administrative remedies. In view of the Court's conclusion that the notice provided to the Navajo Nation in February, 1985, was adequate, the Navajo Nation did not file a timely Notice of Appeal and has therefore failed to exhaust its administrative remedies for purposes of judicial review under the APA. Accordingly, this Court is without jurisdiction to review the grazing rental determination for the period from 1979 to 1984. *White Mountain Apache Tribe*, 840 F.2d at 677; *Faras*, 845 F.2d at 204.

The Navajo Nation nevertheless contends that this case presents a situation where exhaustion should not be required due to evidence of administrative bias. This contention is based on statements made by the Assistant Secretary in the determination letter dismissing the Navajo appeal. The Secretary stated that had the value

determinations been "new or novel issues", he would have been more inclined to accommodate the Tribes on their appeals, and that "as a practical matter I do not see any material change in outcome had this appeal been heard." (Navajo Motion for Summary Judgment, Ex. 5, p.2). In *White Mountain Apache Tribe*, the Court stated,

> [t]here are exceptional circumstances where exhaustion may not be required. For example, administrative review may be futile by virtue of a preannounced decision by the final administrative decision-maker. [Citation omitted]. There may also be objective and undisputed evidence of administrative bias which would render pursuit of an administrative remedy futile. [Citations omitted].

White Mountain Tribe, 840 F.2d at 677.

Without more, these statements do not indicate a "preannounced decision" or "objective and undisputed evidence of administrative bias". Rather, they state a conclusion that the matters sought to be appealed were the same issues that had in fact already been fully considered and determined in prior appeals of the 1980 rental determination. In context, they constitute an explanation as to why special consideration would not be given to granting an exception to the time requirements for filing appeals, not at [sic] to why the appeal was dismissed.

Accordingly, the United States' Motion to Dismiss CIV 87-1966 PHX EHC will be granted, and its Motion for Summary Judgment is moot. The government's argument that it has not waived its sovereign immunity need not be considered.

III. Hopi Tribe's Motion for Judgment upon and Enforcement of Rental Determination

As the administrative determination with regard to the 1979-1984 Grazing Rental Determination (BIA.NH.1) is final, and the Court does not have jurisdiction to review the determination, the Court will grant the Hopi Motion for Judgment upon and Enforcement of Rental Determination.

The only issue remaining is whether the Court should include an award of prejudgment interest to compensate the Hopi Tribe for the delay in receiving payment for the use of its land.

IV. Hopi Tribe's Motion for Partial Summary Judgment

On July 5, 1985, the Hopi Tribe filed a Motion for Partial Summary Judgment as to the Navajo Nation's liability for prejudgment interest, contending that payment of interest is necessary in equity and to satisfy Congressional intent that the Hopi Tribe be fully and fairly compensated. The Navajo Tribe contends that it is not liable for prejudgment interest due to its sovereign immunity, and that prejudgment interest is not otherwise required by the statute or equity considerations.

Indian tribes have long been recognized as distinct, independent political communities with the status of sovereign entities. *See, United States v. Wheeler,* 435 U.S. 313, 322-323, 98 S.Ct. 1079, 1086, 55 L.Ed. 303 (1978). Although their incorporation into the United States has necessarily divested them of some aspects of sovereignty, Indian

tribes have not lost their full sovereignty in the absence of Congressional action:

> The sovereignty that the Indian tribes retain is of a unique and limited character. It exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status. [Citation Omitted].

Wheeler, 435 U.S. at 323, 98 S.Ct. at 1086.

Because of this status, Indian tribes possess the common law immunity from suit absent Congressional waiver or tribal consent to suit. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed. 106 (1978); *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, ___ U.S. ___, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991); *Burlington Northern v. Blackfeet Tribe*, 924 F.2d 899, 901 (9th Cir. 1991); *Pan American v. Sycuan Band of Mission Indians*, 884 F.2d 416, 418 (9th Cir. 1989). The common law immunity of Indian tribes is coextensive with that of the United States. *Kennerly v. United States*, 721 F.2d 1252, 1258 (9th Cir. 1983) (citing *Santa Clara Pueblo*, 436 U.S. at 58, 98 S.Ct. at 1677); *Pan American*, 884 F.2d 418; *Evans v. McKay*, 869 F.2d 1341, 1345 (9th Cir. 1989). *See also*, F. Cohen, *Handbook of Federal Indian Law* 324 (2d ed. 1982). It is well settled that the United States, as a sovereign government, is not liable for interest on claims against it in the absence of express consent manifested by the legislature or lawful contract. *United States v. Louisiana*, 446 U.S. 253, 100 S.Ct. 1618, 100 S.Ct. 1618

(1980); *United States v. Bayard*, 127 U.S. 251, 8 S.Ct. 1156, 32 L.Ed. 159 (1888); *United States v. North Carolina*, 136 U.S. 211, 10 S.Ct. 920, 34 L.Ed. 336 (1890); *Rooney v. United States*, 694 F.2d 582 (9th Cir. 1982). Similarly, Indian tribes, having sovereignty similar to that of the United States, are not liable for interest unless liability is created by statute or assumed by an authorized contract. *United States v. United States Fidelity & Guar. Co.*, 106 F.2d 804 (10th Cir. 1939), *rev'd on other grounds*, 309 U.S. 506, 60 S.Ct. 653, 84 L.Ed. 894 (1940); *see also* 42 C.J.S. Indians § 11.

The immunity of a sovereign to payment of interest on obligations cannot be waived by implication, *Santa Clara Pueblo*, 436 U.S. 49, 58, 98 S.Ct. at 1677, or by reference to legislative history or intent, without a clear expression in the statute. *United States v. New York Rayon Importing Co.*, 329 U.S. 654, 659, 67 S.Ct. 601, 604, 91 L.Ed. 577 (1947); *Tillson v. United States*, 100 U.S. 43, 25 L.Ed. 543 (1879) (a special statute authorizing recovery against the government does not justify interest unless the legislature declares it in express terms). A waiver of sovereign immunity "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. 49, 58, 98 S.Ct. at 1677, *citing United States v. Testan*, 424 U.S. 392, 96 S.Ct. 948, 47 L.Ed. 114 (1972), (quoting *United States v. King*, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed. 52 (1969)); *Sisseton-Wahpeton Sioux Tribe v. United States*, 895 F.2d 588, 594 (9th Cir. 1990). Such waivers are also to be strictly construed. *New York Rayon Importing Co.*, 329 U.S. at 659, 67 S.Ct. at 604; *Testan*, 424 U.S. at 399-401, 96 S.Ct. at 954.

The Hopi Tribe contends that the Congressional waiver of the sovereign immunity of the Navajo Tribe in

the Settlement Act for purposes of resolution of the land dispute encompasses the payment of interest on unpaid rent. The section of the Settlement Act authorizing payment of rent, 25 U.S.C. 640d-15(a), provides:

> The Navajo Tribe shall pay to the Hopi Tribe the fair rental value as determined by the Secretary for all use by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to [this Act] subsequent to the date of partition thereof.

There is no specific reference to the payment of interest in this section. Further, neither the language of the statute nor the legislative history makes any unambiguous reference to the anticipated timing or frequency of either the rental determinations or payment. There is no unequivocal waiver of immunity as to interest in the section authorizing payment of rent.

The Hopi Tribe contends that the express waiver of sovereign immunity in other sections of the Act encompasses interest on delayed rental payments. Section 640d-17(c) authorizes additional actions between the tribes which may be necessary to insure quiet enjoyment of the tribes' reservations:

> Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desireable [sic] to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this subchapter.

In connection with CIV 74-842, the Court has held that "section 640d-17(c) merely codifies the equitable jurisdiction of a federal court to issue ancillary bills to effectuate a court decree." *Sekaquaptewa v. MacDonald*, 448 F.Supp. 1183, 1187 (1978), *aff'd in part, rev'd in part, Sekaquaptewa v. MacDonald*, 619 F.2d 801, *cert. denied*, 449 U.S. 1010, 101 S.Ct. 565, 66 L.Ed.2d 468 (1980), *citing, Hamilton v. Nakai*, 453 F.2d 152, 157 (9th Cir.), *cert. denied*, 406 U.S. 945, 92 S.Ct. 2044, 32 L.Ed.2d 332 (1972).

Section 640d-17(e) provides:

> (e) Remedies. All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this subchapter.

The language of § 640d-17(e) indicates that any remedies must be provided for in the Federal Rules of Civil Procedure or be otherwise available to the district courts. There is no provision for the award of prejudgment interest in the Federal Rules or any federal statute; 28 U.S.C. § 1961 authorizes only the award of postjudgment interest.[12] Further, the award of prejudgment interest is not the "enforcement and collection of judgments". Neither

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[12] This Court does not address whether 28 U.S.C. § 1961 authorizes the award of post-judgment interest against the Navajo Nation. It has been held that section 1961 does not waive the government's sovereign immunity. *See Thompson v. Kennickell*, 797 F.2d 1015 (D.C. Cir. 1986).

section 640d-17(c) nor 17(e) provides the waiver of the Navajo Nation's sovereign immunity sought by the Hopi Tribe.

Further, in contrast to section 640d-15(a), sections 640d-17(a)(1) and (2), Congress expressly provided for interest at a specified rate on amounts collected for revenues and license fees, and for amounts awarded as compensation for pre-partition use. Interest was expressly denied on a claim for pre-partition damage to the land. See 640d-17(a)(3). This suggests that Congress was aware of the need to expressly provide for interest, and did not intend to provide interest on the rental claim. While the express denial of interest on the damage claim also arguably supports the conclusion that interest is permitted on rental amounts because it was not expressly denied, case law requires the waiver of sovereign immunity to be explicit. The Settlement Act does not contain a specific unequivocal express authorization for payment of interest on the rental claims in either the section authorizing payment of rent, or elsewhere.

The Hopi Tribe also argues that the Navajo Nation does not have sovereign immunity as to another sovereign for the purposes of prejudgment interest, citing *Texas v. New Mexico*, 482 U.S. 124, 107 S.Ct. 2279, 96 L.Ed.2d 105 (1987), and *West Virginia v. United States*, 479 U.S. 305, 107 S.Ct. 702, 93 L.Ed.2d 639 (1987).

In *Texas v. New Mexico*, the Supreme Court rejected New Mexico's argument that the Court did not have the statutory authority to award postjudgment interest, and held that it had the same power as other federal courts to award postjudgment interest. *Texas*, 482 U.S. at 132, n. 8.

This case is inapplicable here: 28 U.S.C. § 1961 explicitly allows interest payments after the entry of judgment, and the *Texas* Court did not address the issue of prejudgment interest, for which there is no explicit statutory authorization. More importantly, New Mexico did not argue that it had sovereign immunity from interest payments.

In *West Virginia v. United States*, the Supreme Court addressed the liability of the State of West Virginia for prejudgment interest on loans provided under the Disaster Relief Act of 1970 after the "Buffalo Creek Disaster" in 1972. Before applying the usual rule that private parties must pay prejudgment interest to the United States where the underlying obligation is contractual, *Royal Indemnity Co. v. United States*, 313 U.S. 289, 295, 61 S.Ct. 995, 85 L.Ed. 1361 (1941), the Court balanced the interests of the two governments to determine whether an award of interest was equitable. *West Virginia*, 479 U.S. at 309. The Court found that prejudgment interest was required due to the federal policy of sharing the burdens of disasters with the states and the federal government's interest in complete compensation. *West Virginia*, 479 U.S. at 310-311.

The Hopi Tribe argues that this Court should balance the equitable concerns between the Tribes and award prejudgment interest. However, *West Virginia* also is not applicable in this case: the Supreme Court had specifically pointed out that a state has no sovereign immunity as against the Federal Government, citing *United States v. Texas*, 143 U.S. 621, 646, 12 S.Ct. 488, 36 L.Ed. 285 (1892). Thus, before this Court can balance any equitable considerations, it must first find that an award of prejudgment

interest is not barred by the Navajo Nation's sovereign immunity.

Because there has not been an explicit waiver of the Navajo Nation's sovereign immunity as to prejudgment interest, this Court finds that the Navajo Nation is not liable for the payment of prejudgment interest on post-partition rental payments, and the Hopi Tribe's Motion for Partial Summary Judgment will be denied.

Accordingly,

IT IS ORDERED that the Navajo Nation's Motion for Summary Judgment is denied (document #78).

IT IS FURTHER ORDERED that the Navajo Nation's Motion for Review of Rental Determination is denied (document #71).

IT IS FURTHER ORDERED that the United States' Motion to Dismiss CIV 87-1966 PHX EHC is granted (document #13).

IT IS FURTHER ORDERED that the Hopi Tribe's Motion for Judgment Upon and Enforcement of Rental Determination is granted (document #69). The Clerk of Court is directed to enter partial judgment pursuant to Rule 54(b) in the amount of $1,186,190.77, minus the partial payment of $459,841.84, for a total of $726,348.93, the Court finding that there is no just reason for delay.

IT IS FURTHER ORDERED that the Hopi Tribe's Motion for Partial Summary Judgment is denied (document #18).

DATED this 2nd day of July, 1992.

/s/ Earl H. Carroll
Earl H. Carroll
United States District Judge

UNITED STATES DEPARTMENT OF THE INTERIOR

BUREAU OF INDIAN AFFAIRS
WASHINGTON, D.C. 20245

(SEAL)

IN REPLY REFER TO:

CERTIFIED MAIL RETURN RECEIPT REQUESTED

NOV 26 1985

John Paul Kennedy, Esq.
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Ten East South Temple
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Louis Denetsosie, Esq.
Navajo Department of Justice
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Re: Navajo and Hopi appeals challenging the Joint Use Administrative Office's determination of "fair rental value" of Hopi lands used by Navajo tribal members.

Gentlemen:

On October 25 and October 29, 1982 this office rendered partial decisions on administrative appeals filed on behalf of your clients challenging certain rental determinations made by the former Joint Use Administrative Office's Project Officer. Those previous decisions addressed only grazing land rental values. Rental value determinations for homesite and farming uses were deferred until a later date.

The statute that mandates payment of rent for these lands provides that the Navajo Tribe shall pay to the Hopi Tribe the "fair rental value", as determined by the Secretary, of the land used by Navajo tribal members who are residing on land partitioned to the Hopi Tribe. See 25 U.S.C. § 640d-15.[1] The Navajo Tribe is then supposed to pay the Hopi Tribe for the value of land used by its members. We also note at this juncture that many of the "uses" of land for which the Hopi Tribe claims it should be compensated are incidents of the use of land, and as such are not directly capable of being assessed a rental value, e.g., access to roads and shopping, and the use of land for ceremonial and other traditional purposes. To the extent these uses have value, those values are encompassed in the rental value of the land itself. These "uses" therefore are not assigned a separate value in this decision.

After reviewing the data used as a basis in formulating the Project Officer's decision on homesite valuation, I determined that the data was inadequate to support that decision. In addition, the Project Officer did not make a value determination for those lands used for farming purposes. Inasmuch as the Project Office has ceased to exist since the making of the original valuation decision, and because this matter is already or will probably ultimately result in litigation, it was decided not to remand this matter back to the Bureau's Phoenix Area Office. Instead, The Bureau's Central Office staff was instructed

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[1] Inasmuch as Hopi tribal members removed themselves from Navajo partitioned lands after the partition of the land, the instant appeals involve only Navajo use of Hopi lands.

to accumulate and/or coordinate the gathering of sufficient data for this office to make a *de novo* review of the land rental issue and make a new valuation determination. The final appraisal reports derived from that data are attached, incorporated herein by reference, and form the basis for this decision.

The Project Officer's original determination of homesite values was premised on the assumption that there was no market data available for any other use of land in the area for purposes other than grazing use. Based on this assumption, the Project Officer reasoned that since the primary use of land in the area was for grazing purposes, the rental value should be based on the value of grazing land. Allowing for adjustments for distance to paved roads and the availability of water, the Project Officer determined the fair annual rental for the homesite tracts involved in these appeals was from $2.25 to $3.25 per acre per year. The Project Officer determined the cumulative annual rental for homesites from 1978 through 1982 to be $5,373.25.

As more fully explained and documented in the homesite appraisal report, several hundred sales of comparable land used for homesites located adjacent to the Navajo Reservation demonstrate that if land of similar quality to that at issue in these appeals were to be offered for sale, there is a definite market for such land. Based on that sales data, and the normal rental ratio of 8% to 10% of market value per year, the rental rate has been recalculated and yields a rental owed, through the end of calendar year 1984, of $751,143.45.

Determining a rental for the value of land used for farming purposes is difficult since the "farms" in question are all subsistence in nature. None-the-less, a value, as explained in the attached farm value report, has been assessed and yields a cumulative rental from 1978 through 1984 of $238,828.05. The aggregate value for the use of Hopi lands for homesite and farming uses through 1984 is, thus, $989,971.50.

We agree with the Hopi Tribe that under the statute the Secretary does not have the obligation or the authority to collect the rents mandated by the statute. Such rents are collectable by the Hopi Tribe in an action authorized by 25 U.S.C. §§ 640d-15(a) and 17(a)(3). Since the Secretary does not have the authority to collect the rental, it follows that he does not have the authority to collect interest on that rental. Any interest owed can also be sought by the Hopi Tribe in an action as authorized by §§ 640d-15(a) & 17(a)(3).

After thoroughly reviewing the data and methodology used in determining the rental value of the lands used by Navajo tribal members for homesite and farming uses, I find that the values reached in the attached reports constitute "fair rental value" as specified by the statute and, as explained in this decision, adopt those value determinations. This decision is based on the exercise of

discretionary authority and is, pursuant to 25 C.F.R. § 2.19(c)(1), final for the Department.

Sincerely,

/s/ Hazel E. Elbert
Acting Deputy Assistant
Secretary – Indian Affairs

Attachments

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

THE HOPI TRIBE Plaintiff-Appellee, Cross-Appellant, v. THE NAVAJO TRIBE, et al. Defendant-Appellant, Cross-Appellee, v. UNITED STATES OF AMERICA, et al. Defendants-Appellees.	No. 92-16448, 92-16510 92-16839, 92-16840 DC Nos. CIV-85-801-PHX-EHC CIV-87-1966-PHX-EHC (Consolidated) ORDER (Filed May 4, 1995)

Before: CHOY, POOLE and REINHARDT, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 95-199

Supreme Court, U.S.
FILED
SEP 1 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

THE NAVAJO NATION,

Petitioner,

vs.

THE HOPI TRIBE and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT THE HOPI TRIBE

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QUESTION PRESENTED

Whether the Ninth Circuit Court of Appeals correctly determined that the Navajo-Hopi Settlement Act, 25 U.S.C. § 640d *et seq.*, allows for an award of prejudgment interest against the Navajo Nation in a suit brought by the Hopi Tribe pursuant to that statute to collect rental payments for Navajo use of Hopi lands.

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Rules Cited:

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Supreme Court Rule 10.1(c) 7, 8, 13

Other Authority Cited:

Robert L. Stern *et al.*, *Supreme Court Practice* § 4.6 (7th ed. 1993) 12

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BRIEF IN OPPOSITION FOR RESPONDENT THE HOPI TRIBE

The Hopi Tribe ("Tribe" or "Respondent") respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case.

STATUTORY PROVISIONS INVOLVED

§ 640d-15. Payment of fair rental value for use of lands subsequent to date of partition

(a) The Navajo Tribe shall pay to the Hopi Tribe the fair rental value as determined by

> the Secretary for all uses by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to sections 640d-7 and 640d-2 or 640d-3 of this title subsequent to the date of the partition thereof.

25 U.S.C. § 640d-15(a) (1988).

> § 640d-17. Actions for accounting, fair value of grazing, and claims for damages to land
>
> (a) Authorization to commence and defend actions in District Court
>
> Either tribe, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof, is hereby authorized to commence or defend in the District Court an action or actions against the other tribe for the following purposes if such action or actions are not settled pursuant to section 640d-2 or 640d-3 of this title:
>
> (1) for an accounting of all sums collected by either tribe since the 17th day of September 1957 as trader license fees or commissions, lease proceeds, or other similar charges for the doing of business or the use of lands within the joint use area, and judgment for one-half of all sums so

collected, and not paid to the other tribe, together with interest at the rate of 6 per centum per annum compounded annually;

(2) for the determination and recovery of the fair value of the grazing and agricultural use by either tribe and its individual members since the 28th day of September 1962 of the undivided one-half interest of the other tribe in the lands within the joint use area, together with interest at the rate of 6 per centum per annum compounded annually, notwithstanding the fact that the tribes are tenants in common of such lands; and

(3) for the adjudication of any claims that either tribe may have against the other for damages to the land to which title was quieted as aforesaid by the United States District Court for the District of Arizona in such tribes, share and share alike, subject to the trust title of the United States, without interest, notwithstanding the fact that such tribes are tenants in common of such lands: Provided, That the United States may be joined as a party to such an action and, in such case, the provisions of sections 1346(a)(2) and 1505 of Title 28 shall not be applicable to such action.

(c) Further original, ancillary or supplementary actions to insure quiet enjoyment

Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable to insure the quiet and peaceful enjoyment of the reservation lands of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this subchapter. Such actions may be commenced in the District Court by either tribe against the other, acting through the chairman of its tribal council, for and on behalf of the tribe, including all villages, clans, and individual members thereof.

(e) Remedies

All applicable provisional and final remedies and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this subchapter.

25 U.S.C. § 640d-17(a),(c),(e) (1988).

STATEMENT OF THE CASE

Between April 18, 1979 and October 31, 1984, individual members of the Navajo Nation ("Nation" or "Petitioner") occupied more than 900,000 acres of the Hopi Reservation on land known as the Hopi Partitioned Lands ("HPL"), using it for homesite, farming, and grazing purposes. This occupation, which continues today and is without the consent of the Tribe, prevents the Tribe from using and enjoying its own land.

Pending the relocation of these Navajo individuals, Congress provided in the Navajo-Hopi Settlement Act ("Settlement Act") that:

> The Navajo [Nation] shall pay to the Hopi Tribe the fair rental value as determined by the Secretary [of the Interior] for all use by Navajo individuals of any lands partitioned to the Hopi Tribe pursuant to sections 640d-7 and 640d-2 or 640d-3 of this title subsequent to the date of the partition thereof.

25 U.S.C. § 640d-15(a) (1988).

Pursuant to this section, the Department of the Interior ("Department") calculated the "fair rental value" owed by the Nation to the Tribe for use of the HPL between April 18, 1979 and October 31, 1984. The Department determined that the Nation owed the Tribe $1,186,190.77 for grazing, $586,803.60 for homesite, and $191,671.14 for farmsite use during that period.

The Nation appealed these rental determinations within the Department to the Secretary of the Interior ("Secretary"). The Secretary affirmed, with minor modifications, the homesite and farmsite rental awards. The Secretary, however, refused to

consider the Nation's appeal of the grazing rental award, finding that it had failed to file a timely notice of appeal as required by Department regulation.

In separate proceedings, the Nation filed actions in the United States District Court seeking review of: (1) the Secretary's affirmation of the homesite and farmsite rental awards, and (2) the Secretary's refusal to consider its appeal of the grazing rental award. Simultaneously, the Tribe filed an action in the district court seeking to enforce these rental awards. The Tribe had previously brought an action seeking declaratory relief that it could recover prejudgment interest on any rental awards. This latter action was consolidated by the district court with the actions seeking review and/or enforcement of the 1979-84 rental determinations.

On July 6, 1992, the district court entered orders: (1) affirming the homesite rental award; (2) affirming the grazing rental award based on the Nation's failure to file timely its administrative appeal (Pet. App. 53); and (3) remanding the farmsite rental award back to the Secretary to analyze further certain issues. The district court also ruled that the Nation's sovereign immunity prevented the Tribe from recovering prejudgment interest on the rental awards (Pet. App. 62).

The Nation filed separate appeals with the Ninth Circuit challenging: (1) the district court's affirmation of the Department's homesite rental determination, and (2) the district court's affirmation of the Secretary's refusal to consider the Nation's challenge of the grazing rental determination.[1] The Tribe cross-appealed, challenging the district court's holding that

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1. Because the district court remanded the farmsite rental award to the Department for further review, that component of the rental award was not appealed to the Ninth Circuit.

the Nation's sovereign immunity precluded an award of prejudgment interest as a component of the rental awards.

The Ninth Circuit Court of Appeals, in a consolidated opinion: (1) affirmed the homesite rental determination (Pet. App. 21-22); (2) reversed the district court's decision that the Nation's appeal of the grazing rental determination was time barred (Pet. App. 29-30); and (3) reversed the district court's denial of prejudgment interest on the rental awards (Pet. App. 37).

In its petition, the Nation challenges only one of the issues decided by the Ninth Circuit: the narrow question of whether the court correctly allowed the Tribe to recover prejudgment interest as a component of the rental awards.

REASONS FOR DENYING THE WRIT

The Court should deny the petition because it fails to present any "special and important reasons" for granting the writ of certiorari as required by Sup. Ct. R. 10.1, and because the Ninth Circuit's decision below was plainly correct.

First, the narrow issue raised in the petition is of exceptionally limited applicability. The question presented is not, as petitioner implies, an issue of importance to all Indian Tribes (Pet. 11). Instead, the issue raised involves a case-specific interpretation of the Settlement Act — a statute that by its own terms applies only to particular land disputes between these two Indian Tribes. As a case of such limited impact, the petition fails to raise an important question of federal law. Sup. Ct. R. 10.1(c).

Second, contrary to petitioner's assertions (Pet. 11-18), the Ninth Circuit's opinion below does not represent a departure

from, or conflict with, any precedent from this Court, from its own circuit, or from any other circuit. In fact, in its decision the Ninth Circuit consistently cites, relies upon, and applies the very precedents that it is alleged to have consciously disregarded (Pet. App. 30-37). The Ninth Circuit's decision, then, does not raise a conflict with any applicable law. Sup. Ct. R. 10.1(c).

Finally, the Court should deny the petition because the Ninth Circuit's decision below is correct. After carefully examining the relevant provisions of the Settlement Act and its legislative history, the Ninth Circuit correctly concluded that the Settlement Act waived the Nation's immunity from the payment of interest in this case. Moreover, as set forth below, even if the Settlement Act did not waive the Nation's immunity from interest, the Ninth Circuit's opinion would have to be upheld on other grounds.

I.

THE NARROW ISSUE RAISED BY PETITIONER IS OF EXCEPTIONALLY LIMITED APPLICABILITY AND FAILS TO RAISE AN IMPORTANT QUESTION OF FEDERAL LAW.

Instead of raising an issue of importance to all Indian Tribes (Pet. 11), the petitioner is forced to concede that the question it presents is quite "narrow" (Pet. 5, 7, 11). The question presented by the petitioner, in fact, is so narrow, case-specific and of limited impact that it fails to raise an important question of federal law. Sup. Ct. R. 10.1(c).

A. The Doctrine of Tribal Sovereign Immunity from Suit Is Not in Dispute and Is Not an Issue Here.

In arguing that certiorari should be granted, the petitioner devotes much of its brief to defending the proposition that, absent an express waiver of its sovereign immunity, it cannot be sued

(Pet. 11-18). This basic and unassailable principle of tribal sovereignty is not, however, at issue here.

In reaching its decision, the Ninth Circuit had to engage in a two-part analysis of the Settlement Act. First, it had to determine whether the Settlement Act waived the Nation's sovereign immunity from this suit. Second, the Ninth Circuit had to decide whether the Settlement Act also contained an additional waiver of the Nation's immunity authorizing the award of prejudgment interest. In its opinion, the Ninth Circuit found that the Settlement Act contained the additional waiver (Pet. App. 33).

Despite all of its argument about general waivers of sovereign immunity, the Nation has not challenged the first part of the Ninth Circuit's analysis. Indeed, it cannot.[2] This renders meaningless a great deal of the Nation's petition (Pet. 11-16), where it repeatedly asserts that its immunity from suit must be expressly and unequivocally waived. This is not and never has been an issue.

Instead, the only issue before the Court (Pet. i) is the Nation's challenge to the second part of the Ninth Circuit's analysis: its finding that the Settlement Act also includes an

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2. In a provision of the Settlement Act that the Nation did not cite to the Court, Congress waived the Nation's immunity from this suit:

> Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary . . . to fully accomplish all objects and purposes of this subchapter [including an action under 25 U.S.C. § 640d-15(a) to collect "fair rental value"]. Such actions may be commenced in the District Court by either tribe against the other. . . .

25 U.S.C. § 640d-17(c) (1988).

additional waiver of the Nation's immunity authorizing an award of prejudgment interest on the rental awards.

B. The Settlement Act Applies Exclusively to Particular Disputes Between Two Indian Tribes.

The petition thus presents a very narrow question of statutory interpretation. Moreover, the statute the Nation asks the Court to construe is one of exceedingly limited applicability. As set forth in the petition and in the Ninth Circuit's decision below (Pet. 5-7, Pet. App. 4-6), the Settlement Act is a specific Congressional response to a unique, longstanding land dispute between the Nation and the Tribe. The Settlement Act does not apply to any Indian Tribe not having an interest in the disputed land.[3] Furthermore, the Settlement Act does not apply to all disputes that may arise between the Nation and the Tribe. It is limited to those disputes involving the 1882 and 1934 Reservations. It is thus a statute of exceptionally limited applicability and is not, as the petition implies (Pet. 11), one of interest to other Indian Tribes.

As a result, any proclamation by the Court in this case regarding the proper interpretation of the Settlement Act would have no effect beyond the limited number of cases brought between the Nation and the Tribe pursuant to the Settlement Act. For this reason alone, the petition fails to raise an important question of federal law.

C. The Nation Only Challenges a Particular Application of an Acknowledged Legal Standard.

Moreover, as set forth in Part II below, in interpreting the

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3. Besides the Nation and the Tribe, only the San Juan Southern Paiute Tribe ("Paiutes") might conceivably be affected by interpretations of the Settlement Act. The Paiutes, however, have never been a party to this particular case.

Settlement Act, the Ninth Circuit applied all of the relevant precedents from this Court, from its own circuit and from all other circuits. The Nation does not dispute this (Pet. 12, 15). Instead, the Nation argues that the Ninth Circuit *misapplied* the governing law in this particular case when it interpreted the Settlement Act as authorizing the award of prejudgment interest on the rental awards (Pet. i, 13).

This is a crucial distinction, as it further demonstrates the narrowness of the petitioner's claim. The Nation does not accuse the Ninth Circuit of creating a new legal standard. Instead, it merely claims that in this particular case, the Ninth Circuit misapplied the legal standard that the Nation itself agrees should govern. Because the Nation can only challenge a particular application of an agreed-upon legal standard in this case — as opposed to the creation of a new legal standard — the Nation has raised a very narrow issue. As such, the Nation has failed to present an important question of federal law.

II.

THE NINTH CIRCUIT'S DECISION BELOW DOES NOT CONFLICT WITH, AND IN FACT ADOPTS AND APPLIES, GOVERNING PRECEDENT FROM THE SUPREME COURT, OTHER CIRCUITS AND ITS OWN CIRCUIT.

The Nation concedes that the Ninth Circuit's decision fails to raise a conflict with any decision from another circuit court of appeals.[4] Instead, the Nation argues that the Ninth Circuit's

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4. Moreover, the chances of there ever being such an inter-circuit conflict are highly remote. All actions between the Nation and the Tribe brought pursuant to the Settlement Act are to be filed exclusively in the United States District Court in Arizona. *See* 25 U.S.C. § 640d(b) (defining "District Court" as used throughout the Settlement Act to be the "United States District

(Cont'd)

decision conflicts with applicable decisions of this Court and with decisions from its own circuit (Pet. 11-18). In particular, the Nation asserts (Pet. 14) that the Ninth Circuit's decision conflicts with this Court's opinion in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and with the Ninth Circuit's decision in *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989). This simply is not the case.[5]

Instead of creating a conflict with these decisions, the Ninth Circuit actually cites, adopts and applies these governing precedents in arriving at its decision. For example, in holding that the Tribe could recover prejudgment interest from the Nation in this case, the Ninth Circuit explained:

> We read the Settlement Act to include a waiver of any tribal interest immunity in terms sufficiently unequivocal to pass muster even under the strict interpretive standard set forth in *Santa Clara Pueblo* and *McKay*.

(Pet. App. 31 n.7).

The Ninth Circuit did not defy the law or announce a new interpretation of it. Instead, it merely applied the governing law

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(Cont'd)
Court for the District of Arizona"). It is thus highly unlikely that a court outside the Ninth Circuit would ever have the opportunity to interpret this provision of the Settlement Act. Without such a ruling, of course, an inter-circuit conflict would be impossible.

5. Even if the Ninth Circuit's decision did conflict with a decision of another panel from its own circuit, this would not justify granting the petition. *See* Robert L. Stern *et al.*, *Supreme Court Practice* § 4.6 (7th ed. 1993) ("Ordinarily, a conflict between decisions rendered by different panels of the same court of appeals is not a sufficient basis for granting a writ of certiorari.").

to interpret the relevant provisions of the Settlement Act. As such, the Ninth Circuit's decision does not create a conflict with this Court's decisions, with the decisions of other circuits, or with decisions from its own circuit. Sup. Ct. R. 10.1(a),(c).

III.

THE DECISION OF THE NINTH CIRCUIT IS CORRECT.

Finally, the Court should deny the petition because the Ninth Circuit's decision below is correct. The Ninth Circuit correctly found that the Settlement Act has waived the Nation's immunity from the recovery of prejudgment interest in this case. Moreover, even if the Settlement Act did not waive the Nation's immunity from interest, the Ninth Circuit's decision would have to be upheld on other grounds.

A. The Settlement Act Waives the Nation's Immunity from the Recovery of Prejudgment Interest.

In the Settlement Act, Congress waived the Nation's immunity from this suit. 25 U.S.C. § 640d-17(c). In waiving the Nation's immunity, Congress also made clear that the Tribe would be entitled to the full range of remedies available — including the award of prejudgment interest.[6]

The Settlement Act provides that:

> All applicable provisional and final remedies

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6. The Ninth Circuit recognized that prejudgment interest "has become a familiar remedy widely recognized by federal courts as a means to make a plaintiff whole against a dilatory defendant." (Pet. App. 33) (citing *General Motors Corp. v. Devex Corp.*, 461 U.S. 648, 655 (1983) and *Partington v. Broyhill Furniture Industries, Inc.*, 999 F.2d 269, 274 (7th Cir. 1993)).

> and special proceedings provided for by the Federal Rules of Civil Procedure and all other remedies and processes available for the enforcement and collection of judgments in the district courts of the United States may be used in the enforcement and collection of judgments obtained pursuant to the provisions of this subchapter.

25 U.S.C. § 640d-17(e) (1988).

Read in context with the other provisions of the Settlement Act, the Ninth Circuit concluded that "Congress unequivocally waived any tribal immunity from prejudgment interest" (Pet. App. 32).

The Ninth Circuit explained:

> This blanket authorization of "all remedies available" in federal district courts necessitates some inquiry into what damages and costs are currently recoverable there. But in requiring this wide-ranging inquiry, the statutory language does not ipso facto render the congressional waiver of tribal interest immunity therein equivocal. Rather than compile an exhaustive list of currently available remedies and add a clause authorizing additional remedies upon their introduction in federal court, section 640d-17(e) reasonably relies on a more general formulation that *accomplishes the same result with equal clarity and far greater efficiency.*

(Pet. App. 33) (emphasis added).

In light of the need to examine the "underlying Congressional policy" of the Settlement Act (Pet. App. 36 (citing *Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 521 (1984)), and this Court's admonition to avoid a "crabbed construction" of waivers of immunity (Pet. App. 36 (citing *Franchise Tax Board*), the Ninth Circuit's interpretation of the Settlement Act is correct.

B. The Ninth Circuit's Interpretation Is Consistent with Other Provisions of the Settlement Act.

The Ninth Circuit's decision does not, as claimed by the Nation, render the Settlement Act "internally inconsistent" (Pet. 18-21). The Nation focuses on the fact that the payment of interest is required in certain provisions of the Settlement Act, but is not expressly required in § 640d-15(a). Based on this, the Nation argues that this evinces a congressional intent not to allow for interest on the grazing rental award.

As the Ninth Circuit recognized, the Nation's argument fails to take the whole statute into account. In certain sections of the Settlement Act, Congress expressly required the payment of interest. *See* 25 U.S.C. § 640d-17(a)(1); 25 U.S.C. § 640d-17(a)(2). In those provisions, Congress mandated the award of interest because at the time it enacted the Settlement Act, it knew there would be an award, that the award was past due, and that the award would be a liquidated, determinable sum. Congress also knew that it would be easy to determine what amounts were owed for each particular year (Pet. App. 35).

In other sections of the Settlement Act, Congress expressly disallowed the recovery of interest. In § 640d-17(a)(3), for instance, Congress allowed either tribe to recover for any damage inflicted to the land by the other tribe. Congress disallowed the recovery of interest on any such award because even though it knew that damage had occurred, it also knew that precise proof as

to when particular damage occurred and as to how much damage existed at any given time was uncertain (Pet. App. 35).

The Ninth Circuit recognized that 25 U.S.C. § 640d-15(a), the relevant provision in this case, lies somewhere in between. It neither requires nor proscribes an award of interest (Pet. App. 35). Because Congress neither specified nor prohibited prejudgment interest in this section, the Ninth Circuit correctly held that a court has discretion to award it:

> While section 640d-15(a) does not address interest awards, section 640d-17(e) explicitly expresses Congress' intention that, in the event of litigation to enforce or collect a judgment under the Settlement Act, federal courts shall have at their disposal the full panoply of remedies and processes available therein, including prejudgment interest.

(Pet. App. 35-36).

Contrary to the Nation's position, this reading of the Settlement Act is entirely appropriate and does not render the mention of interest in various subparts of § 640d-17(a) "superfluous" (Pet. 20). In certain sections of the Settlement Act, the award of interest is required. In certain sections of the Settlement Act, the award of interest is prohibited. In this case, where the award of interest is neither required nor prohibited, it is within the Court's discretion to award it.

C. The Ninth Circuit's Decision Is Correct on a Number of Alternative Grounds.

Finally, even if the Settlement Act did not waive the Nation's immunity from interest in this case, the Ninth Circuit's decision would still be correct.

First, there may be no need for an additional waiver of the Nation's immunity as to the payment of interest. *See Missouri v. Jenkins*, 491 U.S. 274, 281 n.3 (1989) (noting that special rule requiring an additional waiver of immunity as to interest applies "only where the United States' liability for interest is at issue"); *see also Pegues v. Mississippi State Employment Service*, 899 F.2d 1449, 1454 (5th Cir. 1990) (holding, in light of *Jenkins*, that when Congress waives a state's immunity to suit, it "does not limit the tools with which courts could fashion relief. . . . The award of prejudgment interest is one of those tools"). Hence, the unequivocal waiver of the Nation's immunity from suit in 25 U.S.C. § 640d-17(c) may be sufficient to waive the Nation's immunity from paying prejudgment interest on the rental awards.

Moreover, no additional waiver of immunity as to the payment of interest is required in a case, like this one, where the litigants are equal sovereigns. *See Texas v. New Mexico*, 482 U.S. 124, 132 n.8 (1987) (allowing award of post-judgment interest in an action between two states, without requiring additional waiver as to the payment of interest). The Ninth Circuit's decision is thus justifiable on a variety of grounds.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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v.

THE HOPI TRIBE and
THE UNITED STATES OF AMERICA,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY MEMORANDUM

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No. 95-199

In The

Supreme Court of the United States

October Term, 1995

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PETITIONER'S REPLY MEMORANDUM

The Navajo Nation (the "Nation") respectfully submits the following brief in reply to the Brief in Opposition for Respondent the Hopi Tribe.

1. In an effort to bolster the Ninth Circuit's decision, the Hopi Tribe argues that between 25 U.S.C. § 640d-17(c) (1988) and 25 U.S.C. § 640d-17(e) (1988), the Nation's immunity against an award of prejudgment interest has been abrogated. However, this contention is wholly unsupported by the Ninth Circuit's decision. *Hopi Tribe v. Navajo Tribe*, 46 F.3d 908 (9th Cir. 1995). Indeed,

other than a passing reference to § 640d-17(c) in describing the district court's opinion, the Ninth Circuit's decision is silent with respect to that section of the Navajo-Hopi Settlement Act, Pub. L. No. 93-531, 88 Stat. 1712 (codified as 25 U.S.C. §§ 640d to 640d-31 (1988 & Supp. 1993) ("Settlement Act")).

Section 640d-17(c) provides:

> Either tribe may institute such further original, ancillary, or supplementary actions against the other tribe as may be necessary or desirable *to insure the quiet and peaceful enjoyment of the reservation lands* of the tribes by the tribes and the members thereof, and to fully accomplish all objects and purposes of this subchapter.

25 U.S.C. § 640d-17(c) (1988) (emphasis added). In an earlier decision construing this section of the Act, the district court ruled that it "merely codifies the equitable jurisdiction of a federal court to issue ancillary bills to effectuate a court decree." *Sekaquaptewa v. MacDonald*, 448 F. Supp. 1183, 1187 (D. Ariz. 1978), *aff'd in part rev'd in part*, 619 F.2d 801 (9th Cir.), *cert. denied*, 449 U.S. 1010 (1980). At issue in *Sekaquaptewa v. MacDonald* was whether an action for an accounting with respect to the 1934 reservation lands[1] had been authorized by Congress when it adopted § 640d-17(c). The district court ruled that an action for an accounting was "not necessary to effectuate any decree this Court might make, or 'to insure the

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[1] The 1934 reservation lands are to be distinguished from the 1882 Executive Order reservation lands. The former lands are treated separately under the Navajo-Hopi Settlement Act (*see* 25 U.S.C. § 640d-7 (1988)) and are not at issue in the instant litigation.

quiet and peaceable [sic] enjoyment of the reservation lands.' " 448 F. Supp. at 1187 (quoting 25 U.S.C. § 640d-17(c) (1988)).

The court of appeals agreed with the district court that implying a claim for an accounting would be inconsistent with the Nation's sovereign immunity. The appeals court stated that "[t]he United States and Indian tribes such as the Navajos possess coextensive sovereign immunity. . . . When Congress consents to suit [against a tribe], it may impose limitations. Limitations must be 'strictly observed and exceptions thereto are not to be implied.' " *Sekaquaptewa v. MacDonald*, 619 F.2d at 808 (citation omitted).

The district court in the instant litigation, just like the district court and the court of appeals in *Sekaquaptewa*, concluded that § 640d-17(c) merely "authorizes additional actions between the tribes which may be necessary to insure *quiet enjoyment of the tribes' reservations.*" *Hopi Tribe v. Navajo Tribe*, Civ. No. 85-801 PHX EHC, 87-1966 PHX EHC (Consolidated) Slip Op. 19 (D. Ariz. 1992) (emphasis added) (Pet. App. 58). Since an award of prejudgment interest on post-partition rent has nothing whatever to do with the quiet enjoyment of tribal lands, the district court properly concluded that § 640d-17(c) did not contain an express waiver of the Nation's immunity against such an award.

The Ninth Circuit relied solely on § 640d-17(e) in finding a waiver of the Nation's sovereign immunity with respect to an award of prejudgment interest. In fact, the Hopi Tribe is unable to cite to any portion of the Ninth Circuit's opinion supporting its claim that the waiver of

the Nation's immunity from an award of prejudgment interest is found in 25 U.S.C. § 640d-17(c) (1988) because no such analysis exists. Thus, the Hopi Tribe's effort to bolster the Ninth Circuit's decision is unsupported by the panel's opinion.

2. Moreover, the Hopi Tribe has distorted the Nation's argument concerning waivers of sovereign immunity. A waiver or abrogation of tribal sovereign immunity must be express. The Ninth Circuit's finding that § 640d-17(e) accorded the parties "blanket authorization of 'all remedies available' in federal district courts. . . . " 46 F.3d at 922 (Pet. App. 33), violated the long-standing principle that tribal sovereign immunity will not be deemed abrogated by congressional legislation unless expressed unequivocally therein.[2] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Department of Game*, 433 U.S. 165 (1977); *United States v. United States Fidelity & Guar. Co.*, 106 F.2d 804 (10th Cir. 1939), *rev'd on other grounds*, 309 U.S. 506 (1949); *Evans v. McKay*, 869 F.2d 1341 (9th Cir. 1989).

The Nation challenges whether the language of § 640d-17(e) constituted an express waiver of immunity from an award of prejudgment interest. Under the "no-

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[2] It must be remembered that the Ninth Circuit's reliance on the "all remedies available" language in § 640d-17(e) to support its conclusion that the Nation's sovereign immunity against an award of prejudgment interest was abrogated is misplaced. Those words modify the substantive provision of that section, which relates solely to "the enforcement and collection of judgments in the district courts of the United States. . . . " Section 640d-17(e) has nothing to do with prejudgment interest or any other remedies available to litigants in district courts.

interest" rule, without such an express waiver, an award of prejudgment interest cannot be made against a sovereign. The no-interest rule has been applied to prevent parties from recovering interest in a suit against the United States in the absence of an express waiver of sovereign immunity from an award of interest. *Library of Congress v. Shaw*, 478 U.S. 310, 311 (1986). Likewise "[t]he common law immunity afforded Indian tribes is coextensive with that of the United States. . . . " *Evans v. McKay*, 869 F.2d at 1345; *Sekaquaptewa v. MacDonald*, 619 F.2d at 808 ("The United States and Indian tribes such as the Navajos possess coextensive sovereign immunity."). The principles of the no-interest rule apply equally to an Indian tribe unless or until the rule is expressly limited by Congress. *United States v. United States Fidelity & Guar. Co.*, 106 F.2d 804 (10th Cir. 1939), *rev'd on other grounds*, 309 U.S. 506 (1949). Consistent with prior decisions of the Court, as well as the Ninth Circuit, § 640d-17(e) does not contain an express limitation of the "no interest" rule and, therefore, cannot abrogate the Nation's immunity against an award of prejudgment interest.

3. The Ninth Circuit failed in its attempt to explain why Congress unequivocally authorized the imposition of prejudgment interest in §§ 640d-17(a)(1) and (a)(2), but failed to mention prejudgment interest in § 640d-15(a). The Hopi Tribe's explanation is that "[b]ecause Congress neither specified nor prohibited prejudgment interest in [§ 640d-15(a)], the Ninth Circuit correctly held that a court has discretion to award it." (Brief in Opp. 16). This conclusion is not logical. In fact, the Ninth Circuit reached the opposite conclusion in an earlier related case. *See Sekaquaptewa v. MacDonald*, 619 F.2d at 809, *infra* p. 6.

The Hopi Tribe attributes Congress' silence on the subject of prejudgment interest in § 640d-15(a) to institutional insouciance. According to the Hopis, when Congress was silent on the subject, it intended to pass the buck to the courts to decide whether there would be an award of interest.

However, the rule is clear that " 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.' " *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). *Accord INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987). Accordingly, if Congress had intended to include an interest award in addition to post-partition rent, prejudgment interest would have been expressly provided for in § 640d-15(a).

In *Sekaquaptewa v. MacDonald*, the Ninth Circuit affirmed the district court's conclusion that the Hopi Tribe was not entitled to an accounting in connection with its claim to 1934 reservation lands. 619 F.2d at 809. Congress explicitly provided for an accounting in connection with the 1882 reservation lands. *See* 25 U.S.C. § 640d-17(a)(1) (1988). However, Congress was silent regarding an accounting claim with respect to the 1934 reservation lands. *See* 25 U.S.C. § 640d-7 (1988). The Ninth Circuit concluded, therefore, that congressional silence barred such a claim. Likewise, congressional silence regarding prejudgment interest in § 640d-15(a), as contrasted with §§ 640d-17(a)(1) and (a)(2) where Congress explicitly provided for such awards, should lead to

the same result – that an award of prejudgment interest on post-partition rent has not been authorized.

4. The Hopi Tribe argues, as it did in the district court and the appeals court, that the Nation does not enjoy sovereign immunity against another sovereign for purposes of prejudgment interest. It attempts to support this argument by comparing the Navajo Nation to a state and cites *Texas v. New Mexico*, 482 U.S. 124 (1987). (Brief in Opp. 17). This argument was rejected by the district court (Pet. App. 60-61) and ignored by the appeals court.

The Supreme Court has determined that Indian tribes are not states within the meaning of the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3. Rather, the Commerce Clause draws a clear distinction between states and Indian tribes. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 191 (1989). Moreover, Indian tribes did not surrender their immunity in the plan of convention. *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2583 (1991) ("[I]t would be absurd to suggest that the tribes surrendered immunity in a convention to which they were not even parties.") Likewise, Indian tribes did not ratify the United States Constitution. Therefore, the Hopi Tribe's rationale and reliance on *Texas v. New Mexico* fails. Express statutory authorization must be given before a waiver of tribal sovereign immunity can be found.

CONCLUSION

For the reasons expressed in its petition and in this reply brief, the Nation respectfully requests that the Court grant its petition for writ of certiorari. In the alternative and because the Ninth Circuit appears to be incapable of following its own prior decision in the related case of *Sekaquaptewa v. MacDonald*, Petitioner suggests that summary reversal is in order.

Respectfully submitted,

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